United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

77-7169

IN THE

United States Court of Appeals

For the Second Circuit

No. 77-7169

ABNER HARKAVY,

Plaintiff-Appellant,

—against—

APPAREL INDUSTRIES, INC. and S. M. ELOWSKY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

Pages 1a-166a

UNITED STATES COURT OF APPEALS
FILED
JUL 15 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

AUSTRIAN, LANCE & STEWART
Attorneys for Plaintiff-Appellant
630 Fifth Avenue
New York, New York 10020
(212) 489-9500

WARSHAW, SYLVESTER, BURSTEIN & FRANKS
Attorneys for Defendants-Appellees
555 Fifth Avenue
New York, New York 10017
(212) 972-9100

PAGINATION AS IN ORIGINAL COPY

INDEX

	Page
Docket Entries	A-C
Excerpts of Transcript of Proceedings	1a-157a
Plaintiff's Witnesses	
Abner Harkavy	
Direct	3a
Cross	37a
Douglas H. Bellmore	
Direct	46a
Defendants' Witnesses	
Max D. Jaffee	
Direct	51a
Cross	66a
Samuel M. Elowsky	
Direct	79a
Cross	110a
Redirect	129a
Seymour M. Bag	
Direct	133a
Cross	141a
Daniel Grey	
Direct	149a
Cross	152a
Opinion of Bonsal, D.J. dated February 17, 1977 . . .	158a
Judgment Appealed From	164a
Notice of Appeal	166a

INDEX

(Exhibit Volume)

Plaintiff's Exhibits	For Iden.	In Evid.	Reproduced at page
1 - Agreement dated March 10, 1969 between Apparel Industries, Inc. and various Stockholders in connection with a Plan of Reorganization	18a	100a	167a
2 - Preliminary Prospectus of Apparel Industries, Inc. dated November 29, 1972	22a	100a	196a
3 - Article in Women's Wear, November 12, 1969	23a	62a	227a
Defendants' Exhibits			
A - Right of First Refusal dated Feb. 6, 1946	39a	97a	228a
B - Bill of Sale from Korden Manufacturing Co., Inc. to Harkavy Kohn dated September 30, 1968	41a	100a	229a
E - Unaudited Consolidated Balance Sheet of Apparel Industries as of Dec. 31, 1970 and Consolidated Statement of Income prepared by Rogoff & Chanin	99a	100a	237a
F - Waiver of Meeting of Shareholders held on March 10, 1969	130a	131a	244a
G - Meeting of Special Meeting of Board of Directors of Apparel Industries held on January 15, 1970	131a	132a	245a

CIVIL DOCKET
UNITED STATES DISTRICT COURT

4/8/77

Jury demand date:

73 CIV. 4764

C. Form No. 106 Rev.

JUDGE BONSAL

TITLE OF CASE	ATTORNEYS
ABNER HARKAVY,	For plaintiff: GALLAND, KHARASCH, CALKINS & BROWN 40 Wall ST., NYC 10005-269-7266
-against-	
APPAREL INDUSTRIES, INC. and S.M.ELOWSKY,	
	For defendant: Warshaw Sylvester, Burnstein & Franks 555 Fifth Ave.N.Y. 10017-972-9100

UNITED STATES COURT OF APPEALS FILED JUN 16 1977 A. DANIEL FUSARO, CLERK SECOND CIRCUIT

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.		DISB.
S. 5 mailed X	Clerk		4/7/73	Galland	15		
			1/18/77	Ustal			
S. 6 mailed	Marshal						
asis of Action: S.E.C.Act-934-Sec.10; Rule 10b-5 In Excess of $500,000	Docket fee						
	Witness fees						
ction arose at:	Depositions						

A-1468

3 Civ 4764 Abner Harkavy vs. Apparel Industries, etano

73 CIV. 476

DATE	PROCEEDINGS	Date Order Judgment No
1-7-73	Filed complaint and issued summons.	
ov.21-73	Filed summons with marshals return: Served: Apparel Industries by M.Albert on 11-9-73. S.M. Elowsky by P.Saballo on 11-9-73.	
ov.29-73	Filed deft's affidavits & notice of motion to dismiss action ret., 12-17-73.	
ov.29-73	Filed deft's memorandum of law in support of their motion ret.12-17-73.	
an.2-74	Filed pltff's statement in accordance with rule 9(g).	
an.2-74	Filed affidavit of A.Harkavy in opposition to motion to dismiss, complaint.	
an.2-74	Filed pltff's memorandum of law in opposition to deft's motion for, dismissal ret.before Bonsal,J.	
an.8-74	Filed pltff's notice to take deposition of deft. S.M. Elowsky.	
n.10-74	Filed reply affidavit of S.M. Elowsky to pltff's answering affidavit,	
n.10-74	Filed deft's reply memorandum of law in support of their motion to, dismiss.	
n.30-74	Filed deft's statement pursuant to rule 9(g).	
or.25-74	Filed pltff's revised statement of disputed facts pursuant to rule, 9(g).	
or.25 74	Filed MEMORANDUM #40640: Deft's move pursuant to Fed.R.Civ P. 12(b) (6) to dismiss complaint for failure to state a claim upon which, relief can be granted & in the alternative for summary judgment: Deft's also move pursuant to rule 2 for an order requiring pltff. to post security for costs in the amount of $250 since pltff is not a resident of New York. Deft's motion for summary judgment is, granted as to pltff's second claim for breach of contract & in, all other respects is denied. Deft's motion pursuant to rule 2. for an order requiring pltff. to post security for costs in the, amount of $250 is granted. Settle order on notice.Bonsal J. m/n	
ay.7-74	Filed ORDER & JUDGMENT: Ordered that deft's motion for summary, judgment to dismiss the third count of pltff's complaint is, granted& that judgment be entered pursuant to FRCP 54(b) in deft's, favor dismissing the third count. Pltff. within 30 days from, the date of this order pay into this court the sum of $250 to, be applied to the payment of the costs in this action. Until, such payment or filing, all other proceedings on the part of, pltff. except to review or vacate this order be & the same, are stayed. Bonsal,J. judgment Ent. Clerk. m/n Ent.5-13-74.	
y.21-74	Filed pltff's notice that security for costs has been posted with, the clerk of the court.	
ay.22-74	Filed ANSWER to complaint by defts.	WSB&F
ay.24-74	Filed AMENDED ANSWER to to the first & second counts of the complaint.	
N 24-75	PRE-TRIAL CONFERENCE HELD BY Bonsal J.	
r.23-75	Filed deft's affidavit & notice of motion for summary judgment ret. 5-19-75.	
r.23-75	Filed deft's memorandum of law in support of motion for summary judg.	
r.25-75	Filed deft's statement of undisputed facts pursuant to rule 9(g).	
r.25-75	Filed deposition of Deft. Apparel Industries, taken by pltff. on 2-4-75.	
r.25-75	Filed Deposition of Daniel A. Gray taken by pltff. on 3-12-75.	
-09-75	Filed pltff's affidavit & notice of cross-motion for summary judg. ret.6-16-75.	
-09-75	Filed pltff's memorandum of law in support of motion for summary judg. ret.6-16-75.	
-09-75	Filed pltff's statement of material facts pursuant to rule 9(g).	

Cont'd on page #2

v 4764 Abner Harkavy vs. Apparel Industries, etano 73 Civ

JUDGE BONSAL

C. 110 Rev. Civil Docket Continuation page #2

DATE	PROCEEDINGS
11-13-75	Filed deft;s reply memorandum in support of motion for summary judg
11-13-75	Filed reply affidavit of S.M. Elowsky to pltff's answering affidavi
11-13-75	Filed Memo-Decision #43383: Pltff's cross motion for summary judg. is denied. Deft's motion for summary judgment as to the second cause of action is granted. Settle order on notice. Bonsal,J. m
12-01-75	Filed Judgment & Order that deft's motion to dismiss the remaining allegations of the first cause of actinn is denied. Deft's motion for summary judgment to dismiss the second cause of action of pltff's complaint for breach of contract is granted. Pursuant to rule 54(b) judgment be entered in deft's favor dismissing the second cause of action. Pltff's cross-motion for summary judgment on the first & second causes of action as to liability is denied. Bonsal,J. judgment Ent. Clerk. m/n Ent.12-1-75.
02-19-76	Filed pltff's notice to take deposition of deft.
02-24-76	Filed defts' Cross Notice to take deposition.
04-29-76	Filed pltff's statement of facts & statement of issues as part of the pre-trial order on consent.
09-08-76	PRE-TRIAL CONFERENCE HELD BEFORE BONSAL,J.
09-21-76	Filed supplemental pretrial order on consent. So ordered. Bonsal.J.
09-08-76	Pre-trial conf. held before Mag. Bernikow.
10-15-76	Pre-trial conference held before Mag. Bernikow
12-23-76	Filed defts' supplemental trial memo of law,
12-29-76	Non Jury Trial begun & cont'd
12-30-76	Trial cont'd & concluded decision in favor of defts . Bonsal J.
02-17-77	Fld Opinion # 45612re: judgment may be entered for defts. The fore going constitutes the Courts findings fo fact & conclusions of law FRCP 52[a] . Settle Jdgmt on notice. BONSAL J. m/n
03-02-77	Fld Judgment that the complaint is dismd ,defts to recover their costs to be taxed from pltff . BONSAL J. Judgment Entered 3/8/77 Clerk m/n
03-23-77	Fld Bill of COsts Docket as Judgment # 77,411 . Billof costs taxed in the sum of $ 549.33 in fsvor of defts as against pltff & added to jdgmt . CLERK m/n
04-08-77	Filed Notice that pltff appeal to the U.S.C.A from the final jdgmt entered 3/8/77 . m/n
4-22-77	Filed ORDER TO SHOW CAUSE re; an order enlarging pltffs time to file its notice of appeal. ret. 4/27/77 before BonsalJ. LASKER J.
04-25-77	Filed affdvt. of Anthony Paulazzo of service of order to show cause Upon Warshaw,Sylvester,Burstein & Franks for defts. on 4-22-77.
04-25-77	Filed memo. of law on behalf of pltff. in support of motion to enlarge for one day time for filing notice of appeal.
04-25-77	Filed Answering affdvt. of Charles L. Sylvester re: support defts. opposition of -pltff's. motion.
04-27-77	Filed memo end on entry docketed 4/22/77 re: motion granted extending time to appeal by one half. BONSAL J. m/n
5-23-77	Filed Transcript of Record of Proceedings Dec. 29,30,1976.

A TRUE COPY
RAYMOND F. BURGHARDT, CLERK

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

73

1a

JPjw 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

ABNER HARKAVY, :

Plaintiff,

vs. : 73 Civ. 4764

APPAREL INDUSTRIES and
S.M. ELOWSKY,

: Defendant.

----------x

December 29, 1976
2:00 P.M.

B E F O R E:

HON. DUDLEY B. BONSAL,
District Judge.

A P P E A R A N C E S :

GALLAND, KHARASCH, CALKINS & BROWN, ESQS.,
Attorneys for Plaintiff
WILLIAM KARAS, ESQ.,
DAVID BROWN, ESQ., of Counsel

WARSHAW, SYLVESTER, BURSTEIN & FRANKS, ESQS.,
Attorneys for Defendant
DONALD KUBA, ESQ.,
MARTIN LEE, ESQ., of Counsel

(In open court)

THE COURT: Both sides ready?

MR. BROWN: Yes, your Honor.

MR. KUBA: Yes, your Honor.

THE COURT: I have had a chance to review the pretrial order and something designated as subsequent to the pretrial order. This is in connection with the sale of a stock and whether it is in violation of 10(b)5 on the later sale of the stock; is that correct?

MR. KARAS: Yes, your Honor.

THE COURT: If either of you may want to make an opening statement, which you are entitled to do, I would just as soon hear the evidence right in.

Do you want to make an opening?

MR. KARAS: That's satisfactory to plaintiff.

THE COURT: Do you want to make an opening statement?

MR. KUBA: No, your Honor.

THE COURT: Why don't we start with the testimony.

MR. BROWN: If I may, may I move the admission of my partner William Karas, a member of the United States District Court of the District of Columbia, who will be trying this case before you.

THE COURT: I will be glad to hear from Mr. Karas in connection with this case.

Mr. Karas, you may proceed.

MR. KARAS: We call to the stand, your Honor, the plaintiff, Mr. Abner Harkavy.

A B N E R H A R K A V Y , the plaintiff, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KARAS:

Q Mr. Harkavy, are you the plaintiff in this action?

A Yes, sir.

Q Would you state for us your residence, please.

A 222 Fountain Drive, Linchberg, Virginia.

Q What is your present occupation, Mr. Harkavy?

A Manager of a department concern.

THE COURT: What is the name of it, sir?

THE WITNESS: Ken Rose Manufacturing Company.

Q Were you at any point in your life an employee of Apparel Industries of any corporation associated with the defendant S.M. Elowsky?

A Yes, sir.

Q When was that?

A From 1933 to 1968.

Q Would you recite for us, please, the positions you held for such companies during that time?

A In the beginning I was in the shipping department. From there to piece goods, cutting department, production and then eventually vice-president of production.

Q For what companies?

A Kordeen Manufacturing Company, Sport Teams Incorporated, Sport Toggs Incorporated.

THE COURT: Are these all subsidiaries?

THE WITNESS: All subsidiaries.

THE COURT: All subsidiaries of Apparel Industries.

Q Where were you physically headquartered during your occupation with Elowsky Companies?

A From 1933 to 1938 I was in New York. But from '38 to '68 I was stationed in Herkimer, New York.

Q What positions did you hold from, say, 1960 through the termination of your employment in 1968?

A I was vice-president in charge of production, assistant to the president.

THE COURT: At whose request?

THE WITNESS: The president was Bernard Elow.

Q What relationship does Bernard Elow hold to the defendant S.M. Elowsky, please?

A They are brothers.

Q What did your duties entail as vice-president and assistant to the president during that time?

A It was to oversee the general running of the factory, the shipping of the goods, the receiving of the goods, general overseeing of the entire operation in Herkimer.

Q What type of garments did your Herkimmer plant produce during the period say, 1960 through 1968?

A Sportswear such as slacks, skirts, blouses, jumpers, jackets.

THE COURT: Do I understand that was the Kordeen Company that was doing that?

THE WITNESS: That was the Kordeen Company, yes, sir. In ladies sizes and most of the time after '62 to '63 was mostly junior sizes, ninety percent would be junior sizes.

Q During what period of time, Mr. Harkavy?

A I'd say from 1962 until we closed in '68.

Q Would you explain very briefly what the

difference between junior sportswear is as opposed to any other type of sportswear?

A Junior sizes usually run from 3 to 15 and misses sizes run from 8 to 16 or 8 to 18. They are for the younger people, the junior sizes.

Q Well, the junior sizes, are you saying that the junior sizes only run to odd numbers?

A Odd numbers.

Q When did your association with Apparel terminate?

A June 28, 1968.

Q And can you describe for us the circumstances under which you left the employ of Apparel in June, 1968?

A I'd say around the middle of May or the last of May I was instructed by Mr. S.M. Elowsky to make plans to close the factory on the last Friday of June, pay the girls their last salaries due them plus their vacation pay.

THE COURT: This is the factory in Herkimer,, sir?

THE WITNESS: That's right, sir.

Q You were terminated after how many years of employment then?

A It would be thirty-five years.

Q Mr. Harkavy, what financial compensation, if any, did you receive upon termination?

A Nothing.

THE COURT: What did you do after you were terminated, sir?

THE WITNESS: I bought part of the factory that I needed --

THE COURT: This is machinery up in Herkimer?

THE WITNESS: Machinery, yes. I purchased it and went into business by myself with another gentleman who was in business with me there.

THE COURT: What is his name?

THE WITNESS: William Kohn.

THE COURT: Where did you set up your business?

THE WITNESS: The building we were in was up in Herkimer Industries. We set up our own operation. Not in the manufacturing, though, but in the contracting.

THE COURT: In other words --

THE WITNESS: Which was a different area.

THE COURT: You were manufacturing for contractors?

THE WITNESS: Yes. We were making contracting for manufacturers, yes, sir.

THE COURT: What were you manufacturing?

THE WITNESS: At that time we were manufacturing ladies dresses.

THE COURT: So, you went into business by yourself with Mr. Kohn and you bought some of the machinery from Apparel.

THE WITNESS: That's right, from Kordeen Manufacturing.

THE COURT: Which was a subsidiary. Okay.

Q Moments ago, Mr. Harkavy, you testified you received no compensation upon termiantion of your employment. Did you subsequently receive any compensation from Apparel or Mr. Elowsky as a result of the termination of your employment?

A I think it was in 1971 that I received a check for $2,000 from Mr. S.M. Elowsky. In fact, the check was made out from Herkimer Industries to Abner Harkavy.

THE COURT: I take it that was after this sale in the stock that we are talking about, it was after that that you received the $2,000?

THE WITNESS: That's right, sir.

Q How long was your newly formed company with Mr. Kohn in operation, Mr. Harkavy?

A Approximately from July 15th or 16th, there-

abouts to -- we turned the key in on January 10, 1972.

Q What were the circumstances that led to the cessation of operations of Harkavy-Kohn Manufacturing?

A Well, we started contracting in '68, contracting ladies dresses and we were going along pretty well. We added machinery, we increased the factory in '70 or the tail end -- around '70, dresses seemed to die and pants suits came in.

I had a union shop that was with a division of the union, dress union and the cost of operation to make dresses is much higher than it is the cost of sportswear which is another division of the union.

The manufacturers at that time when they went into pants suits could give the top of a pants suit to a sportswear contractor and the pants to a pants contractor and have it made much cheaper under their provisions with the union than I could make it.

THE COURT: What you are saying, as I understand it, the change in fashions plus the union, is that the International Ladies Garment Workers Union?

THE WITNESS: Yes.

THE COURT: It was impossible for you to work in that area.

THE WITNESS: To compete, yes, sir.

10a

Q In 1969 and 1970, how did your company fare financially?

A Well, we incorporated in '68 to '69 and the years '68 to '69 I personally believe we did very well. We increased our inventory, we drew a living salary, we bought partnership insurance, our bills were paid and we were looking forward until this dress situation changed into pants suits.

Q In 1969 did you show a profit or a loss?

A The year '68 to '69 we broke even. In the years '69 to '70 we showed a loss. The loss of that year came in the last five, six months of that year because of the change in design and fashion.

Q In March of 1969 and in January of 1970, were you in need of funds as a result of losses that your company may have incurred?

A No, sir.

Q Did you sell 366 shares of Apparel stock in March, 1969?

A Yes, sir.

Q Can you give us the exact date, please?

A It was March 15, 1969.

Q What was the substance of your discussions, if any, with any of the defendants with respect to the sale

by you and the purchase by them of your 366 shares?

A Oh, I used to come to New York very often on my own business and I never made -- I always made it a point to go up and see Mr. Elowsky --

THE COURT: Do I gather from the papers that he is a cousin of yours?

THE WITNESS: Yes, sir. Thirty-five years I was with the man. I used to go up there and we were on a very cordial basis. I had the stock. I wasn't connected with him but I still have the stock and I always asked him the usual question, how's business? I got the usual reply, we are losing money.

Q Well, you say the usual reply. During the years that Apparel was profitable, he didn't give you that reply, did he?

A Well, from the time I left until that point and after that point when I go up there I got the same reply, "We are losing money. Business isn't good."

Q Now, going back to your employment with Apparel, can you tell us briefly the circumstances under which you acquired your shares of Apparel?

THE COURT: Does it really matter how he acquired it? The question is the issue. What happened when he sold it.

MR. KARAS: That's a good point, your Honor.

THE COURT: I don't think it does. I think it is all in these papers anyway. I think the issue is the circumstances under which he sold it.

Q As to the March 15, 1969 sale, why did you sell 366 shares at that time?

A Well, I owned at that time 3,366 shares, three certificates, one of 2,000, one of 1,000 and one of 366.

I really wanted to hold on to it all. But, as I say, when I heard -- even though I heard that business was bad and we're losing money, I said, well, maybe I'll sell the 366 and go on a vacation.

It amounted to, I think, 13, $1400. But I definitely held on to my 3,000.

THE COURT: These things he did. I think what the question is directed to, what were the circumstances -- you came to New York and you saw Mr. Elowsky.

How did it come about at that point that you sold 366 shares?

THE WITNESS: I asked him how business was and he said it wasn't good.

THE COURT: Is that usually what he told you?

THE WITNESS: Yes. I said, well, maybe,

13a

I ought to sell my stock.

He says, well, if you want to sell it, I'll buy it.

I said, well, I don't to sell it. I'd just as soon hold it but I'll sell the 366 shares and hold on to the 3,000.

THE COURT: That's what you said at the time?

THE WITNESS: Yes, sir.

Q So, following up on that question, Mr. Harkavy, did you initiate discussions with respect to that sale of 366 shares?

A No. How it was initiated, I probably said, maybe I ought to sell.

Mr. Elowsky said, well, I'll buy it.

Q What were you paid for those shares?

A I think I was paid $3.83 a share, something in that vicinity.

Q Was that price in any way related to book value in your talks with Mr. Elowsky?

A That much related to book value.

Q When did you sell your remaining 3,000 shares?

A The exact date was January 15, 1970.

Q Did you have any discussions with Mr. Elowsky

14a

or any other officer of Apparel before the time --

THE COURT: Well, tell us the circumstances under which you came to sell those 3,000 shares.

THE WITNESS: After the time I sold my 366, again, I said, I used to come to New York maybe two, three times a month and again, go, through this procedure. This went on from March all the way through to January, this -- I saw no action. I was told there was nothing.

THE COURT: What do you mean by "saw no action"?

THE WITNESS: I mean in the place. The business was slow and I was told we were losing money and after my thirty-five years with Mr. Elowsky, who I had great faith in him and his ability, I wanted to hold on for dear life because I always thought he was capable of turning it around and doing something with it.

Because the stock I had was all that I had after thirty-five years of labor. But, again, business was bad and we're losing money. I don't know whether I took in the factor of his age or it just didn't seem like there was any future in the --

THE COURT: So, you came out of there thinking in January of 1970, if that's the right time, you thought you might be prepared to sell this stock.

THE WITNESS: I might be prepared to sell it because of the circumstances that existed.

Q Were you told anything else by Mr. Elowsky, Mr. Harkavy?

A Anything else?

Q With respect to the company, to Apparel, its prospects, events that may have occurred with respect to the House of Morrison?

MR. KUBA: Objection.

THE COURT: That's a funny question. I think what he is asking you is, tell us in your own words what happened, when you decided in January, I guess you were told he was not doing well and you thought you wanted to sell you stock. Tell us what happened from that point on.

THE WITNESS: Well, I think at that time he had acquired the Houseof Morrison.

THE COURT: Did he tell you that?

THE WITNESS: He told me that he was working on the deal for the House of Morrison. Also, he had acquired them at that time and he did tell me. I said how are things going? Again it wasn't good. He went on to say maybe he had made a mistake or he was sorry that he did what he did with the House of Morrison.

THE COURT: He told you he acquired the

House of Morrison?

THE WITNESS: Yes. They didn't work like we worked. Words to that effect. I know what he meant and --

THE COURT: What did you think he meant?

THE WITNESS: I worked with the man for thirty-five years and he's a go-getter and everybody who worked for him was a go-getter. These people just didn't seem to have, what he thought, I didn't know what they were because I don't know the gentlemen.

THE COURT: Okay. And what happened then? He told you -- I guess this was in a conversation you had with him?

THE WITNESS: Yes, previous to that.

THE COURT: What happened then?

THE WITNESS: And then after getting back to Herkimer and discussing it with my wife, I said, I don't know if we have got any future with this stock at all. I naturally discussed it with her and I said, well, next time I go down there I'll sell it back to him.

THE COURT: You did go down --

THE WITNESS: Yes, I came down.

THE COURT: Did you see Mr. Elowsky?

THE WITNESS: Yes.

THE COURT: Tell us about that.

THE WITNESS: It was the same discussion we had on the previous 366. I told him, it doesn't look like it's going to be worth anything. If it is going to be worth anything, it will be worth less than what it is now. I figured I better sell out.

THE COURT: That's what you figured?

THE WITNESS: From the circumstances that existed.

THE COURT: What is the price you got for it?

THE WITNESS: The price was $4.35.

MR. KARAS: I think the papers will show it was $4,33.

THE COURT: Could you tell us how that price came about?

THE WITNESS: I don't know. He said I'll pay you book price or book value. When Mr. Elowsky tells me something, I have faith in it.

THE COURT: All right.

Q Mr. Harkavy, I show you now an agreement dated March 10, 1969 between Mr. Elowsky, Apparel and various stockholders whom I will collectively refer to as the Morrison group.

jpjw Harkavy - direct

MR. KARAS: May we have this agreement, your Honor, marked for identification?

THE COURT: I have no objection to marking it for identification, if you want.

MR. KARAS: I intend to ask Mr. Harkavy a number of questions about this agreement.

THE COURT: All right, mark it as Plaintiff's Exhibit 1 for identification.

(Plaintiff's Exhibit 1 marked for identification)

MR. KARAS: Is it your procedure here, Judge Bonsal, to move the introduction into evidence of --

THE COURT: Offhand, I don't see the agreement is relevant. What is the relevance of this agreement?

MR. KARAS: The relevance of the agreement, your Honor, is that the agreement predates Mr. Harkavy's sale of his initial -- of his 366 shares.

The agreement was not disclosed to him.

THE COURT: That's the issue? Ask him that. Ask him if the agreement was disclosed.

MR. KARAS: My question was toyou, whether or not it should be introduced now.

THE COURT: Go ahead, ask the question. It is up to you. You offer it, I will hear from the other

side.

Q Did you see the agreement prior to the sale of any of your shares, Mr. Harkavy?

A No, sir.

Q Were you aware, prior to your sale, that such an agreement existed?

A I was not aware of it.

Q Have you reviewed this agreement subsequent to the sale of your shares?

A Yes, sir.

Q When did you do that?

A I think it was May of '76 at the second deposition.

MR. KUBA: Objection. I don't think the witness understands your question. I didn't understand it. Could you repeat the question?

MR. KARAS: The question was, when did he first review the terms of the agreement. The answer was on or about the time of the taking of the second deposition he saw it.

Q Which was in?

A It was May of 1976.

Q Now, this agreement was entered into approximately five days prior to the first sale of your

stock, is that right?

A Yes, sir.

Q If you saw that agreement or any of its provisions were somehow disclosed to you prior to March 15, 1969, what would you have concluded?

A Oh, I would have concluded two or three things. Number one, by this agreement I see that Mr. Elowsky or Mr. Apparel, whatever it was, was buying back stock.

THE COURT: Were they buying it back or was there an agreement that they could buy it back?

THE WITNESS: It was an agreement that they could buy it back. Which would, in my knowledge, make whatever shares I have, if anything developed, much more valuable.

THE COURT: Why?

THE WITNESS: Well, with less shares out, I firmly believe, it would have been more valuable than if I held them. In this agreement there is also mention at least once or twice something about a public offering which was always my hope that we would have a public offering and that certainly, I think, would make my stock or shares more valuable.

THE COURT: In other words, I take it,

your point is that you were not told at the time you sold 366 shares, one, that the agreement was entered into with any other stockholders providing a reacquisition at book value.

THE WITNESS: Yes, sir.

THE COURT: The second point is there is an indication in this agreement that the company might make a public offering and you weren't informed by Mr. Elowsky that the company might make a public offering.

THE WITNESS: No,sir.

THE COURT: I see.

Q Well, if you had read this agreement prior to the sale of your stock in March, '69, would you have sold that stock?

THE COURT: I will sustain an objection to that. The point really is whether he was misinformed or not informed about things that were relevant and how he would have reacted to it does not make very much difference.

MR. KARAS: Very well, your Honor.

Q As to your sale of stock in March, 1969, did you rely on Mr. Elowsky's statement to you that business was bad in deciding whether or not to sell your stock?

A Definitely.

Q I will ask the same question as to the sale of your stock in January, 1970, did you rely on his representations at that time?

A Yes, sir.

THE COURT: I take it that this was all done orally when you had these conversations with Mr. Elowsky? There was nothing in writing.

THE WITNESS: Nothing in writing, no, sir.

THE COURT: Is there anything in this agreement that you recall that required Mr. Elowsky to buy the stock or just an agreement that he could buy it?

THE WITNESS: What I recall I think was an agreement that he could buy it.

THE COURT: Might sometime in the future?

THE WITNESS: Yes.

Q I show you, Mr. Harkavy, a copy of the preliminary prospectus of Apparel Industries.

(Plaintiff's Exhibit 2 marked for identification)

Q It is dated November 29, 1972 and I refer you specifically to page 15 and to the second paragraph under the heading "certain transactions".

When you sold your shares on January 15, 1970,

were you aware that Apparel had purchased from Hannah Rosen, 41,500 shares of Apparel stock and had purchased from Anna Reiss, 15,000 of Apparel stock?

A No, sir.

Q Had you been aware of those transactions and might that have influenced your decision as to whether or not to --

MR. KUBA: Objection, your Honor.

THE COURT: I can let him answer that.

Q To sell your stock?

A It would have made me think twice and probably I wouldn't have sold it. Because, again, for the same reason there would be less shares out in the corporation.

Q When did you first become aware of the stock transactions we have been discussing between Apparel and Hannah Rosen and Anna Reiss?

A December of 1973, somewhere around that time.

(Plaintiff's Exhibit 3 marked for identification)

Q I show you a copy of a news story from the publication "Womens Wear Daily", dated November 12, 1969.

Would you take a moment to read that, Mr.

Harkavy. 24a

A Yes.

(Pause)

Q When did you first become aware of this article, Mr. Harkavy?

A In 1975.

THE COURT: Do you know anything about the "Womens Wear Daily"?

THE WITNESS: Yes, sir.

THE COURT: Is that a trade paper in your business?

THE WITNESS: It is a trade paper in the ladies line.

THE COURT: You never used to look at it or subscribe to it?

THE WITNESS: I never used to subscribe to it.

THE COURT: But you didn't look at this issue.

THE WITNESS: I was in the ladies line when this came out but we never subscribed to it, it was a little bit expensive for us.

Q Following up on that, did your company ever subscribe, or did your partner ever subscribe?

A No, sir.

Q Now, the article in the three middle paragraphs states that Max Jaffee and Samuel Elowsky are working on plans to open a junior operation in January, 1970.

Were you aware of any plans on the part of Apparel or any of its related companies to open a junior operation as recited in the Womens Wear Daily article?

A No,sir.

Q If Mr. Jaffee and Mr. Elowsky were, in November 1969, indeed working on plans to open a junior operation to recommence junior operations, would that have influenced your decision to sell the 3,000 shares which you indeed sold in January of 1970?

A It would have definitely influenced me not to sell it.

Q Why is that?

A Well, we were in the junior business for quite a long time. The junior line among the different other lines in the industry is a little more lucrative than other lines.

We had a Juniorite division which we sold in 1964 to Russ Togs. It was a well-going and a profit

business. The junior business, as again I say, is probably the best of all the lines as far as a profit showing division.

(Plaintiff's Exhibit 4 marked for identification)

Q I show you now, Mr. Harkavy, if I can look over your shoulder, a copy of an agreement dated June, 1964 between Sport Teens and Russ Togs.

THE COURT: Would you tell me what the purpose of this one is. This happened in 1964. I know you referred to the Womens Wear article --

MR. KARAS: This is the non-compete agreement.

THE COURT: Whose non-compete agreement?

MR. KARAS: This is an agreement between Sport Teens and Russ Togs where Sport Teens, a subsidiary of Apparel undertakes not to compete directly or indirectly with Russ Togs for a period of four years in the junior wear line.

THE COURT: So, the four years have expired.

MR. KARAS: That is right, your Honor. Our purpose, if that's what your inquiry is, was to show that the defendants were legally precluded form being in the junior sportswear line until 19 --

THE COURT: So what?

MR. KARAS: Well, Mr. Harkavy was never told that that prohibition --

THE COURT: You are talking about Russ Togs sales in 1964. Where were you in 1964?

THE WITNESS: I was in Herkimer, New York.

THE COURT: You knew about this?

THE WITNESS: Yes, I knew we sold out. Yes, sir.

THE COURT: I don't know anything about the agreement to not compete, but he says he knows about the sale to Russ Togs.

MR. KUBA: Objection as to relevance, your Honor.

THE COURT: You are a little late. I don't think it is relevant either.

MR. KARAS: Well, your Honor, this may become relevant later on. As you know from the papers one of our contentions is that the defendants had plans in 1969 to re-enter into what was formally a lucrative --

THE COURT: I would like to hear some proof on that before we get into that. This is purely hypothetical. All you are saying that there is an agreement not to compete had run out. That's all this establishes.

Q In the preliminary prospectus which you have in front of you and which is identified as Plaintifff's Exhibit 2, would you refer, please, Mr. Harkavy, to the bottom of page 9 and to the top of page 10 where there is some discussion as to lead time and I would ask you to spend a second to read that.

On the basis of your experience in the production of womens wear and specifically junior wear, is that discussion on lead time, in your opinion, accurate?

A I would say it is accurate. There is one thing that is actually missing, from my opinion. They have a lead time of three to four months and then four to six weeks production. But there is usually a time previous to that for designing and adopting styles that go earlier than the two mentioned times here.

MR. KUBA: Objection, your Honor. Mr. Harkavy has not -- it has not been established that he is an expert witness in this field.

THE COURT: Well, my problem is, so what? Really, I can see where people in this business could disagree on what lead time is. But this registration statement was --

MR. KUBA: November, 1972.

THE COURT: It didn't become effective.

MR. KUBA: It was withdrawn in November, 1973, shortly after this suit was commenced.

THE COURT: Stock was sold in this --

MR. KUBA: Stock was never sold.

MR. KARAS: The relevance of the question, your Honor, is -- well, the relevance of this provision of the prospectus, if what the defendants say is true, then we believe it to be so in the prospectus, that in order to produce its junior line in July of 1970, then they would have to have had plans to do so prior to that time and the question is how much time.

THE COURT: What you are saying is that at the time of the discussion of sale of the 3,000 shares and they had plans and they didn't mention it to Mr. Harkavy?

MR. KARAS: That's right. The defense is that there were no plans at that time. We are attempting to show that there were.

Q Now, the prospectus says that three or four months in advance -- by the way, when does the fall retailing season begin?

A I would say the fall retail selling season begins closely after the 4th of July.

Q Now, the prospectus states that three or

1 jpjw Harkavy - direct
2 four months in advance forthe commencement of the retail
3 selling season the company's lines are introduced to the
4 trade.
5 If the selling season commences in July,
6 when would the line be introduced to the trade?
7 A I would say three to four months previous
8 to that time. It goes back to June, May. March.
9 Q If the production commences four to six
10 prior to March, based on the statements of the prospectus,
11 when would that be?
12 A We would go back probably to the middle
13 of February and then you got to go back for the designing
14 of it.
15 Q Assuming production of Apparel's junior
16 wear line had begun in February, 1970, are there any
17 steps which have to be taken prior to the production --
18 THE COURT: I'm not interested in that
19 here. I am puzzled. Have you got any evidence here that
20 they did market this junior line, if that's what it is
21 called, in the spring of 1970?
22 MR. KARAS: The evidence, your Honor, is
23 that the junior line -- that the defendants had begun
24 to sell their junior line in July of 1970.
25 THE COURT: Of 1970?

MR. KARAS: That's right. We are working backwards from a July date.

MR. LEE: Your Honor, may we have a general objection as to relevance as part of that question and I request it be stricken.

Based upon the fact that a generalized statement in a prospectus have no specific bearing on what the specific practices were on a brand new line and what were the practices with respect to something that was in existence.

THE COURT: I don't think it makes much difference what is in the prospectus. I was interested as to whether the defendant here did begin to sell the junior line and when they began to sell it. And what the lead time would be in connection with that.

MR. KARAS: That's right.

THE COURT: That is the only relevance I can see to it.

MR. KARAS: That's the only relevance we see in it too. We are just using it as a bench mark as to compute --

THE COURT: All right. Let's go ahead.

MR. KARAS: I don't think I got an answer to my last question.

(Record read)

Q In order to produce the garment and to sell it?

A Yes, there had to be, as I said, design, there has to be an adoption and there has to be --

Q What do you mean by adoption?

A Separating which styles are going to be shown to the customers, which styles they don't think they will sell and which is a process -- there also has to be the purchasing of piece goods in advance, the ordering of piece goods, because that sometimes is a long drawn out -- piece goods is the key to the entire operation.

Q How long does all that take?

A Well, it is all according how much they ordered and how much the mills say it is going to take. Many times the goods are ordered previous to the time that the goods are put on sale and not to the retail.

Q Could it be that the goods are already in house somewhere?

A Some goods, probably, when you are in the manufacturing business there are certain goods that are in house but when you come up with a new line, you need a new fabric and you have to order it. You don't have those goods in house. They have got to be ordered weeks

in advance.

Q When you start a new line, would you expect that the lead time would be more or less had you been continually manufacturing in that particular line through a number of selling seasons?

A Well, in my opinion when you are in the business as you are going from one season to another, there are always styles that are carried over from one, say from the fall to the spring where the fabric, maybe the color has changed because in the spring it might be made in light colors, pinks, blues, yellow, maybe in the fall browns, navys and greens.

But the style has been adopted and sometimes you take some from one season and move them right into another just changing the type of goods.

In my opinion it is much easier to go from one season to another when you are operating than it is to start an entire new line, starting from scratch, because you have got nothing to fall back on.

Q I refer you again to the prospectus, page 15. In the third paragraph under the heading of certain transactions, the last sentence of that paragraph which says, "Under said agreement Seymour Bag purchased from the company 20,000 shares of common stock."

Going back to the March 10, 1969 agreement, Exhibit 1, were you aware prior to the sale of your stock that -- well, let me ask you to read the page between pages 22 and 23 of that agreement. That is of the March 10, 1969 agreement, Exhibit 1.

Were you ever aware of the fact that Mr. Elowsky had received 20,000 shares of Apparel stock owned by him or his family to dispose of it at his discretion?

A Never knew of it.

MR. KUBA: Objection as to relevance, your Honor.

THE COURT: Well, I have some question about the relevance but I'm not even sure I understand what you are talking about.

MR. KARAS: We are trying to piece some facts together, your Honor.

THE COURT: It is all right to piece facts together but it is not all right to get inuendos from the facts.

What are the facts?

MR. KARAS: The facts are that Mr. Elowsky in March, 1969 had reserved the right to dispose of 20,000 shares as he saw fit.

THE COURT: Well, suppose he did. Offhand,

so what? That's all this indicates?

MR. KARAS: That's all this indicates. Now, the prospectus indicates that 20,000 shares were sold by Apparel to Mr. Bag in December, 1970.

Now, Mr. Bag is the key man here. Mr. Bag was the president of Juniorite Division before it was sold to Russ Togs and continued in Russ Togs employ and Mr. Bag was rehired soon after his non-compete agreement with Russ Togs had expired and he is the cog in the whole new junior line --

MR. KUBA: I object, your Honor, to this line of questioning.

THE COURT: Cog is his expression.

How much did he pay for this stock, $5 a share?

MR. KARAS: $5 a share.

With your indulgence, your Honor.

THE COURT: Yes.

(Pause)

MR. KUBA: Your Honor, I would like to renew my objection. Because there's been no evidence that the 20,000 common shares that were reserved by Mr. Elowsky in the March 1969 agreement and which he never disposed of prior to January 1, 1970, were the

same shares that Seymour Baq practically two years between March, 1969 and January, 1971 purchased.

Simply, it is an inference upon inference, your Honor.

THE COURT: I am aware of that.

MR. KARAS: We are not alleging those are the same shares.

MR. KUBA: You are inferring.

THE COURT: Let's move along. What else have you got?

MR. KARAS: Your Honor, from the discussion we had earlier as to the relevance -

THE COURT: Would you mind asking questions. Let's go on with the testimony. We are getting into long conferences. What else have you got here?

MR. KARAS: Your Honor, that's all the questions I have for Mr. Harkavy.

THE COURT: Any questions on cross? Any questions you want to ask?

MR. KUBA: Yes, your Honor.

CROSS EXAMINATION

BY MR. KUBA:

Q Mr. Harkavy, in the course of your deposition on June 18, 1974, you testified that in January, 1970, if I recall, that rumors of the new Trou sers product line had reached the street; is that an accurate statement?

A No, I don't think that's --

THE COURT: Are you reading from a deposition? Do you have the questions and answers there?

MR. KUBA: Yes, your Honor. May I read it into the record?

THE COURT: Ask him whether he was asked this question and gave this answer.

Q Mr. Harkavy, the question is --

THE COURT: What is the page?

MR. KUBA: Page 106, line 19 to page 107 to line 9.

Q The question was:

"Q Your testimony is that the source of your information and the basic belief is what is contained in the preliminary prospectus. Is it your allegation that there was something afoot in January 1970 with regard to a new product line and the re-employment of Seymour Bag, is that what you are saying?

"A I asked Seymour Bag what he was doing. He said he is back with S.M. and he is going to try to get the place going again with the usual enthusiasm.

"Q You saw Mr. Bag?

"A Yes.

"Q Spoke with him, but the rumor had been afoot sometime before that?

"A No. The rumor was afoot probably when Seymour Bag went back to work."

My question to you: When to your knowledge did Mr. Bag go back to work for Apparel?

A If I remember correctly I think it was June or -- May or June of 1970.

Q 1970.

A I'm not sure because it made no difference to me when he came back.

Q Wasn't that after your stock sales?

A That was after my stock sales.

MR.KUBA: If your Honor please, may I have two minutes to get my questions in order?

THE COURT: All right. We will take a short recess.

(Recess)

THE COURT: All right, Mr. Kuba.

CONTINUED CROSS EXAMINATION

BY MR. KUBA:

Q I offer an exhibit to you, this one-page letter.

Would you please identify that instrument? Is that your signature?

A That's my signature, yes.

THE COURT: Would you mark it please.

MR. KUBA: I would like to mark it Defendants Exhibit A for identification.

(Defendants Exhibit A marked for identification)

MR. KARAS: Could we have a copy, Mr. Kuba?

MR. KUBA: Yes.

(Handing)

Q Mr. Harkavy, would you please tell the Court the circumstances under which you signed --

THE COURT: I would like to know what it is. What is that?

MR. KUBA: That is the right of first refusal letter effecting the plaintiff's shares in Kordeen which runs to the benefit of S.M. Elowsky --

THE COURT: This is for the exchange of

stock, isn't it?

MR. KUBA: Yes.

THE COURT: I don't think that is involved in this case at all. That would apply to Kordeen stock and not the Apparel stock.

MR. KUBA: Well, your Honor, we claim that it ran to the benefit of Kordeen or its successors or S.M. Elowsky.

MR. KARAS: Your Honor, I object to that characterization of the agreement by counsel.

THE COURT: Yes, I will sustain the objection. He's identified it though.

Q Mr. Harkavy, did you pay any cash consideration forthe stock that you received from Kordeen?

A No, sir.

THE COURT: All I'm interested in, I don't know how important that is, but you received this Apparel stock for exchange of your Kordeen stock?

THE WITNESS: Yes, sir.

THE COURT: What you are saying, so far as the 366 shares and the 3,000 shares, they were formerly Kordeen stock which you had gotten because of the services you rendered to the company, it was incentive stock although you didn't pay for it, it was incentive to keep you working?

THE WITNESS: Yes, sir.

THE COURT: All right. I understand.

Q Mr. Harkavy, at the time you purchased the machinery and equipment from Kordeen Manufacturing C ompany, Inc., was that agreement represented by a promissory note?

A If I am not mistaken, I think it was a chattel mortgage.

Q Would you please identify this,please.

THE COURT: Mark the exhibits, please.

MR. KUBA: This would be DEfendants Exhibit B for identification.

(Defendants Exhibit B marked for identification)

Q Would you please identify this document.

A This is the agreement on the purchase of the machinery from the factory.

THE COURT: That's up in Herkimer?

THE WITNESS: Yes, sir.

Q Under that agreement, Mr. Harkavy, were you required to make payments for the machinery and equipment that you purchased?

A Yes, sir.

Q When was the balance cleared up on the

42a

payment?

A You mean when was it finally paid off?

Q Yes,sir.

A To the best of my recollection it was paid off in June or July of '71.

Q Mr. Harkavy, were you from time to time in arrears with Kordeen and Apparel in payment of --

A Not from time to time. Yes, sometimes I was in arrears and sometimes I would pay up in advance also.

Q Now, at the time that you had your discussion that you testified to with Mr. Elowsky in March, 1969 concerning the purchase of your stock, did your discussion relate to your entire 3,366 shares in March of 1969 or only to the 366 shares?

A The original discussion didn't go around any amount. It was the amount I said I would sell to even off my stock.

We were just discussing how business was. There was not any -- well, I said, maybe I'll sell the 366 shares.

Q Isn't it a fact that the -- I withdraw that.

Did Mr. Elowsky recommend to you in March of 1969 you defer the sale of all your stock until the

purchase of the House of Morrison acquisition finally was determined?

A No, sir.

Q Did he confer with you about his acquisition of the House of Morrison at the time of his discussions with you?

A Yes.

Q Did Mr. Elowsky inform you when the final determination of the purchase price for the House of Morrison transaction, when that had been finalized?

A Not that I remember.

MR. KARAS: Objection to this line of questioning, your Honor.

THE COURT: Why?

MR. KARAS: On the grounds of relevance. The House of Morrison transaction occurred prior to the sale of stock on March 15th.

THE COURT: I understand that. I'll let him ask him.

You knew about the House of Morrison?

THE WITNESS: I knew about the House of Morrison.

THE COURT: That is all this is bringing out, sure.

Q When you discussed with Mr. Elowsky the sale of your stock, did you have with you all your certificates of Apparel?

A I never had any certificates in New York. I don't carry certificates with me.

Q How were the certificates turned ove r to Mr. Elowsky?

A They were mailed to him when I got back to Herkimer. The 366 at that given time and I think the other two at the next --

THE COURT: You would send in your certificates and you would get a check?

THE WITNESS: That's right. It would be taken care of.

MR. KUBA: I have no further questions of the witness.

THE COURT: Any other questions on redirect?

MR. KARAS: No, your Honor. I would like to introduce some --

THE COURT: Let's do it one at a time.

Do you have any questions you want to ask the witness?

MR. KARAS: No, your Honor.

THE COURT: You are excused.

(Witness excused)

MR. KARAS: Your Honor, the plaintiff's second witness is an expert on damages. Does the Court intend to hear that testimony at this time?

THE COURT: Let me hear who the second witness is.

MR. KARAS: The second witness is Dr. Bellemore and he will testify as to damages as well as to issues relating to liability and what a reasonable investor might have done in certain circumstances.

THE COURT: Well, I think I will hear Dr. Bellemore. Let's get the testimony out and I'll hear Dr. Bellemore. You can put him on.

MR. KARAS: I would like to introduce some exhibits now for identification.

THE COURT: Is this in connection with Dr. Bellemore's testimony?

MR. KARAS: No, your Honor.

THE COURT: Let's do one thing at a time. Put Dr. Bellemore on the stand.

MR. KARAS: Dr. Bellemore, would you step up to the stand, please.

DOUGLAS H. BELLEMORE,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KARAS:

Q What is your occupation, Mr. Bellemore?

A Well, I have two occupations. I'm senior professor of investments at the Graduate School of Business at New York University. I was professor emeritus August a year ago but they then put me on contract through 1978. I teach courses in security analysis, valuation of securities and portfolio management.

My second occupation, I have always combined professional investment work and beginning when the firm was started in 1969, John M. Blewer Investment Counsel, I went with that firm as economies and account executive and in charge of research. I have been with them ever since that time.

Q Have you authored any articles or texts or treatise with respect to investment in securities?

A I have published about seven books. My major book in investments first published in 1953, last edition 1974 and the next edition scheduled for '78 about a 1900 page book. It is used in about 100 colleges

1 possibility of a contraction in the number of shares --
2 THE COURT: No, I don't like these questions
3 about would a reasonable stockholder. You have a great
4 expert up there. An expert has said a lot of things.
5 What the reasonable stockholder does -- I will sustain
6 an objection to that.
7 Q Dr. Bellemore, as to the entire agreement
8 of March 10, 1969, what, in your judgment, would have
9 been the reaction of a shareholder in March, 1969 after
10 having reviewed that agreement and specifically, would
11 he have sold his stock at book value?
12 A In my judgment, he would not have.
13 Q Now, assuming that the defendant Apparel
14 had repurchased 56,500 shares of its stock in December
15 1969 and January, 1970 and assuming the outstanding
16 shares as of that date were 524,685, have you computed
17 what percentage the 56,500 shares bears to the total
18 number of outstanding shares?
19 A Yes, sir. Approximately 10.7 percent.
20 Q Now, Dr. Bellemore, I ask you to assume in
21 December, 1969 and in January 1970 before Mr. Harkavy
22 sold his remaining 3000 shares that 56,500 shares of Apparel
23 stock was repurchased by Apparel and also please assume
24 that Mr. Harkavy did not know the number of shares that
25

were thus repurchased.

If Mr. Harkavy were a reasonable investor, a reasonable stockholder, would that fact, would the fact that Apparel had purchased over 10 percent of its outstanding stock be an important factor in deciding whether or not to sell his remaining 3,000 shares?

A Yes.

Q Would you tell us why?

A Well, from what I have testified to before. First, there is an indication that the company thought it was the best investment it could make at the time and it wouldn't have thought so if it anticipated a continuing deficit.

Q Dr. Bellemore, I will ask you to assume a few things, now.

First, that until 1964 Apparel was heavily engaged in the sale of junior wear through a division called Juniorite and that that division was substantially profitable for Apparel on sales of approximately $8million.

I would also ask you to assume that prior to January, 1970 Apparel had a definite plan to resume the production and sale of junior sportswear after a hiatus of about five years.

MR. KUBA: If your Honor please, I would

like to note my objection to that question.

THE COURT: I haven't heard all the question. When I hear it, I will listen to your objection.

Q If such a plan were disclosed to a reasonable stockholder in January, 1970, what might such a stockholder conclude with respect to the value of --

THE COURT: I will sustain an objection to all that, sure. I take it your question really is if the company had been in the junior wear business and it had been profitable and then they sold out to somebody they couldn't go back into it for five years and then they went back into it and he is going to ask you is that a factor that the stockholder might think about in selling his stock.

I think the answer probably would have been if it had been profitable or it would not have been.

Can you answer that?

THE WITNESS: My assumption would be that here is a company operating two years at a deficit and generally had been successful.

Now, they were certainly looking at a method of coming back to profitable operations. This had been a big volume operation inthe neighborhood of $8 million which was about equal to their sales at this time. So, I

would assume that management was making a major move when they anticipated that they could turn the company around. That would have been my assumption.

THE COURT: What you are really saying you think this is a factor if the company was thinking of buying its stock, this would be a material factor to the fellow who was selling the stock, that's what you are saying, is that right?

THE WITNESS: Well, in this case going back into the junior wear business which it hadn't been in.

THE COURT: Yes.

Q Dr. Bellemore, we have distributed to his Honor and to counsel your tables which are identified as Plaintiff's Exhibit 6.

Did you prepare this study?

A Yes, sir.

Q What materials did you refer to in its preparation?

A Well, this Table 1 or everything all together?

Q All the tables.

A Well, first of all, I had this registration statement. As a matter of fact, Table 1 is taken essentially from that. I had some income statements and balance sheets

With that, the defendant may proceed wi th his case. You are excused, Professor Bellemore.

MR. KUBA: I will call as my first witness Mr. Max Jaffe.

M A X D. J A F F E, called as a witness by defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KUBA:

Q Would you please state your name?

A My name is Max David Jaffe.

Q Are you an officer with the defendant Apparel Industries, Inc.?

A Yes, I am.

Q What office do you hold?

A Vice president.

Q Are you also a member of the board of directors?

A I am sir. I would appreciate it if you would talk a little louder because I am hard of hearing.

THE COURT: Why don't you come around to the side here.

Q Mr. Jaffe, how long have you been with Apparel Industries, Inc.?

A Since April, 1969.

Q Prior to April, 1969 what was your employment?

A I was one of the stockholders in a company called Morrison Knitwear Company.

Q In March or April of 1969 was that business purchased by Apparel Industries?

A Yes, it was.

Q How long were you with the business of Morrison Knitwear prior to April, 1969?

A I joined Morrison Knitwear Company in 1946.

Q In what capacity?

A Well, I was an officer, stockholder, and my title there was vice president in charge of sales.

Q And you continued with Morrison Knitwear until its purchase by Apparel?

A That's correct.

Q Prior to joining Morrison Knitwear what was your professional livelihood?

A I was a certified public accountant.

Q In this action, Mr. Jaffe, the plaintiff, in a 10b-5 action under the Securities Act of 1933, makes a number of allegations. One of them is that

during the period March, 1969 to January, 1970 plans were afoot to go public on the part of Apparel's stock. Mr. Jaffe, to your knowledge, was there any specific action taken during that period?

THE COURT: I don't know about specific action. Did this come up during this period?

THE WITNESS: No, sir, not whatsoever.

THE COURT: So far as you know.

THE WITNESS: Not in any conversations that I was a party to.

Q Mr. Jaffe, during that period of March, 1969 to January and February of 1970 which individuals comprised the corporate management of Apparel Industries?

A S. M. Elowsky, Harold Rosen and myself.

Q Another allegation that has been made in this suit is that yourself, together with S. M. Elowsky and a number of signatory parties to a shareholders agreement, and a plan of reorganization entered into in March, 1969 concerning the purchase of the House of Morrison business, conspired to buy out the minority interest of defendant Apparel.

MR. KARAS: Objection.

THE COURT: I will sustain an objection

to that question. It calls for a conclusion. Was that a shareholders agreement, as far as you know, during this period?

THE WITNESS: Yes, there was a shareholders agreement.

THE COURT: Tell us about it.

THE WITNESS: Well, I don't recall the details.

MR. KUBA: May I refer to an exhibit that was introduced yesterday.

Would you please offer it in evidence.

THE COURT: Wait a minute. Let's move along. You want to offer this shareholders agreement?

MR. KUBA: I would like to offer the agreement and plan of reorganization on stipulation it will be marked in evidence as Defendants' Exhibit C, and I would also like to --

MR. KARAS: We have never seen that.

MR. KUBA: You have seen it in the course of discovery and inspection.

MR. BROWN: We may have seen it. We don't have a copy. Could we eventually get a copy?

THE COURT: Have you any objection to receiving this.

MR. KARAS: No.

THE COURT: It is received.

(Defendants' Exhibit C was received in evidence.)

Q Mr. Jaffe --

MR. KARAS: Isn't there a question pending from the bench?

THE COURT: I said what about the shareholders agreement. Tell us about it. You say you can't do it without looking at the agreement?

THE WITNESS: That's correct, sir.

Q Here is a copy of the shareholders agreement of March 10, 1969.

A Would you want me to read through the whole thing?

THE COURT: No. I want to know what the purpose of this agreement was and what was done. If you don't remember you can use that to refresh your recollection.

THE WITNESS: Well, the purpose of this agreement was to effectuate the purchase of Morrison Knitwear Company by Apparel Industries. It was an

agreement between the new stockholders that now came into being.

Q Does the agreement contain various rights of first refusals in the event of death of the parties or retirement of the parties including Mr. Elowsky as well as yourself and the other former shareholders of House of Morrison who became shareholders of Apparel Industries?

A Yes.

Q Did you have any discussions with Mr. Elowsky concerning buying out the minority interests of Apparel between March, 1969 and January or February of 1970 or, for that matter, at any time?

A At no time. At no time did we have any such discussion.

Q May I refer you to page 14 of the plan of agreement and plan of reorganization.

Would you first tell the court what the purpose was of the plan of agreement and plan of reorganization, together with the stockholders agreement that you previously glanced at?

A Well, the purpose of this, as I recollect, was to set up how we were going to operate the business after the takeover by Apparel Industries of Morrison

Knitwear Company.

Q Well, that agreement and plan of reorganization, did it not set forth the agreement for the purchase and sale of the business which consisted of all your stock?

A Right, that's correct.

Q It also included other provisions which, as you say, provided for the management of the business of Apparel and House of Morrison after the acquisition?

A Right.

Q May I refer you to the language appearing at page 14. Would you please examine the paragraph as well as the right of that.

MR. KARAS: Is that the plaintiff reorganization agreement? What agreement are we looking at.

MR. KUBA: Agreement and plan of reorganization, which I'll exhibit to you in a moment.

A Yes, I see this.

MR. KUBA: If your Honor please, I will refer you to that as well.

THE COURT: This is dated March 10th. That's the same day as the shareholders agreement.

MR. KUBA: Yes, they were both executed simultaneously, is that correct?

THE WITNESS: Yes.

MR. KUBA: The reason I'm bringing your attention on that particular one, that apparently the basis of the charge of conspiracy that plaintiff makes against the signatory shareholders.

MR. KARAS: I object to any characterization.

THE COURT: All I want to get is whatever testimony you want.

MR. KARAS: What does it --

MR. KUBA: You are saying it suggests --

THE COURT: Gentlemen, stop talking, really. Ask the witness whatever your questions are.

MR. KARAS: Your Honor, may I have the opportunity to read this.

THE COURT: Oh, sure. Look, I really haven't got the time to waste. You follows had this case a long time. Ask your questions.

Q What was the purpose of that provision which permitted Mr. Elowsky to sell up to the 20,000 shares prior to a certain date and at the request of Mr. Elowsky that Apparel would purchase up to $473,000

of shares?

A Well, as I recollect it, he wanted that option so that he could withdraw some of the capital out of the business because his capital contribution was far in excess of ours.

Q Are you saying that this was to get the consent on the part of yourself and the other Morrison stockholders to a redemption on the part of Apparel out of Mr. Elowsky's stockholdings?

A Yes.

Q And that of his family; was that the purpose of that provision?

A As I can recollect it now, I would say so.

Q Were you represented by independent counsel, and the other House of Morrison shareholders, in the preparation of those agreements?

A Yes, we were.

Q Who was that?

A A man by the name of Aaron Chanin.

MR. KUBA: If the court please, I would like to offer in evidence, if my adversary doesn't object, a memorandum of a telephone conversation with Mr. Chanin made in February, on February 20, 1969.

THE COURT: Show it to your adversary.

MR. KARAS: I will not so stipulate.

THE COURT: Well, you object.

MR. KARAS: I object. I will give you the basis of the objection.

THE COURT: No. You objected. Mark it for identification. Has it been marked for identification?

MR. KUBA: No, it has not.

THE COURT: Mark it for identification.

BY MR. KUBA:

Q Mr. Jaffe, Mr. Chanin, is he alive?

A No, he is not.

Q He passed away when?

A Oh, a number of years ago. I don't recall exactly when.

Q The complaint in this action and the pretrial order --

THE COURT: Would you stop talking about what the complaint says and what the pretrial order says. This is a fact witness, not the kind who can answer to conclusions and pleadings. Ask him what were the circumstances under which this was done. That's how it will help me.

Q Mr. Jaffe, are you familiar -- did you know

Hannah Rosen tannenbaum?

A Did I know her?

Q Yes.

A Yes, I did.

Q She was one of the signatories not only to the plan and reorganization agreement but to the shareholders agreement as well?

A Yes.

Q Were her shares repurchased by Apparel in January, 1970, if you know?

A I know they were repurchased, but I don't know exactly what date.

THE COURT: Do you know what price they were repurchased at?

THE WITNESS: They were repurchased at book value, I know. But what the book value was at that particular date, I don't know.

THE COURT: They were purchased at book value?

THE WITNESS: Yes.

Q Isn't it a fact that under the terms of the shareholders agreement of Hannah Rosen, if she desired to sell her stock, that gave Apparel the right of first refusal to buy her shares back at book. Isn't

that one of the provisions in the shareholders agreement?

A Yes.

Q Mr. Jaffe, the third -- the contention --

THE COURT: Get away from all this, He is a fact witness and I want to get to the facts and not the contentions.

Q Mr. Jaffe, I show you the news release relating to Apparel Industries, Inc. which appeared in the Women's Wear Daily of Wednesday, November 12, 1969. This I believe was marked for identification yesterday morning. I don't recall whether it was offered in evidence. Testimony was given with respect to it. Would you please read that news release.

THE COURT: That is Exhibit 3 for identification.

MR. KUBA: Right. Thank you, your Honor.

THE COURT: Are you offering it.

MR. KUBA: It is stipulated that it is offered in evidence.

((Plaintiff's Exhibit 3 was received in evidence.)

xx Q Have you read the release?

A Yes.

Q Would you please tell the court the circumstances surrounding this news release? Did you contact the Women's Wear Daily or did they contact you?

A No. One of the reporters called me and asked me if there was anything of news that would be of interest to Women's Wear readers. Because I always made a practice to be friendly with all our trade publications for obvvious reasons: good publicity, have your name in front of the public.

During these interviews -- as a matter of fact, I have a full-page article in Knitted Outerwear Times that's out right now. I think these articles enhance our business and enhance the corporation so that we become a more desirable resource to our customers.

Q Let's be specific, Mr. Jaffe. In this article there is a reference to the opening of a new junior wear operation, and that company was working -- the company was working on plans to open a junior operation. Was there any specific information --

THE COURT: Please. At the time you called the reporter what was the status of the company regarding the opening of a new junior operation?

THE WITNESS: Well, that was one of the many things we had discussed as possible ways to diversify our company and increase a company by them.

THE COURT: You discussed it with whom?

THE WITNESS: Mr. Elowsky.

THE COURT: Anybody else at the time?

THE WITNESS: Well, it is very likely Harold Rosen, the other associate, must have been in there at the time.

THE COURT: What was the status of these discussions at the time this article appeared?

THE WITNESS: Well, nothing specific. But we knew at some time in the future, when the opportunity presented itself, we would go into the junior sportswear business because of Mr. Elowsky's background.

THE COURT: What do you mean by when the opportunity presented itself?

THE WITNESS: Well, market conditions being right, possibly being able to get the right people to run it. I guess that's about all I can think of.

Q In other words, Mr. Jaffe, it was nothing more than a hope or aspiration?

MR. KARAS: I object to that.

THE COURT: I sustained an objection to

that. Had you any plan?

THE WITNESS: We had no specific plans.

THE COURT: No plans.

THE WITNESS: None whatsoever.

Q Did anything change between the time of that news release and February, 1970?

THE COURT: No, no. I sustain an objection to that. What did you do about this junior operation?

A Actually, we did not go about it for quite a considerable period of time.

THE COURT: Until when?

THE WITNESS: Oh, I would say the first time we did something about it is when Seymour Bag came into the business.

THE COURT: When was that?

THE WITNESS: Oh, I would say some time about the middle of 1970, I would estimate.

THE COURT: Middle of 1970. He came to the company, and what happened then?

THE WITNESS: We started to set up the junior sportswear business.

THE COURT: All right, you started to set up the junior sportswear business.

MR. KUBA: No further questions.

CROSS EXAMINATION

BY MR. KARAS:

Q Mr. Jaffe, I am counsel to the plaintiff.

Following up on the last question, actually your last answer, you testified that the first time Apparel did anything about its plans to enter into a junior line was when Seymour Bag came into the business in mid-1970. Do you know a gentleman by the name of Daniel Grey?

A Yes.

Q Who is Mr. Daniel Grey?

A Mr. Daniel Grey was a salesman in the ladies' sportswear business who was employed by Mr. Elowsky to set up a missy pants business. He operated in that capacity for a period of time. Exactly how long, I don't remember. But I do know he operated strictly missy pants business. Because that's where he came from, the missy pants market.

Q When was he employed by Apparel?

THE COURT: If you remember that. Do you remember about when?

THE WITNESS: I would estimate somewhere around March or April, 1970.

Q What was the purpose of his employment, do you know?

A Yes, the purpose of his employment was to set up a missy pants business. He was a pants expert.

Q And that pants business became known -- did that pants business become known under a trade name soon thereafter?

A No, it was not. It was operated under the name of Sport Teams, which is one of the original pants companies.

Q What is Trousers Up?

A Trousers Up is a company that was formed subsequent to Seymour Baq coming into this business to operate as a junior organization.

Q What were Mr. Grey's duties when he came on board in April, 1970?

A To merchandise and sell missy pants.

THE COURT: You had that three times. He said that three times. That was his job when he came.

THE WITNESS: Yes, that was his job.

Q Did he design any new line of pants?

A Yes, he did.

Q And that new line of pants, was that sold -- subsequently when it was produced, was that sold under any trade name?

A No. The missy pants was sold under the original corporate name, Sport Teams.

Q Who designed the Trousers Up line?

A Well, after Trousers Up was formed Dan Grey designed the Trousers Up line.

Q When did he do that?

A After Trousers Up was formed, which happened some time after Seymour Bag came to the organization, I don't remember the exact date that we formed Trousers Up, but it was after Seymour Bag came to the company.

Q Is Trousers Up a separate organization under Apparel?

A It is a division of Apparel.

Q You referred to it as a company. Is Trousers Up a company?

A No, it is just a division.

Q Mr. Jaffe, when did you, Mr. Elowsky and Mr. Rosen begin your discussions with respect to entering the junior wear -- the junior wear line?

A Well, I would say it was some time after

House of Morrison came into the picture with Sports Teams, which would be April of 1969. I would say we had discussions of a lot of things, of possible future actions to enhance the company. So I can't put an exact date, but I know it was some time after April, 1969.

Q Well, is it possible that -- let me ask this question. When -- in March of 1969, when Apparel acquired the House of Morrison, was the House of Morrison a profitable operation?

A No.

Q Was Apparel a profitable operation?

A Yes.

Q Are you familiar with Apparel's financial statement for the year 1969?

A No, sir, I couldn't recall it now, what it was.

Q Well, would you call it a profitable operation if you knew --

THE COURT: Well, he said it was profitable. What is that based on, sir?

THE WITNESS: Well, it was making money.

THE COURT: How did you know that?

THE WITNESS: When we were holding our

merger talks or what we called our merger or sales talks. We showed them our statements and they showed us their statements.

Q Do you know how profitable they were at year end 1968?

A I couldn't possibly recall that.

THE COURT: You don't recall that.

Q Well, will this refresh your memory.

THE COURT: Show him the statement and then ask him the question.

MR. KARAS: Well, the statement shows --

THE COURT: Don't tell us what the statement shows. Show him the statement and ask him if it refreshes his recollection.

THE WITNESS: Well, this obviously shows --

THE COURT: Does it refresh your recollection as to what the earnings were?

THE WITNESS: It does not.

Q Those financial statements do not refresh your recollection?

A No.

Q When you testified that Apparel was profitable, was it very profitable?

A No.

Q How profitable would you characterize Apparel at that time?

A I couldn't possibly recall that.

THE COURT: You don't recall?

THE WITNESS: I don't recall.

Q Were there any discussions when you were discussing merger -- I'm sorry; acquisition with Apparel, was there any discussion as to --

THE COURT: Discussing whose acquisition with whom?

MR. KARAS: Apparel's acquisition of the House of Morrison.

Q Were there any discussions as to what plans Apparel might have under -- after that acquisition?

A Well --

Q You became an officer after that acquisition, did you not?

A Yes.

Q And so did Mr. Morrison?

A Well, as I understand it, one of the prime reasons Mr. Elowsky wanted to acquire Morrison Knitwear Company was to get what he called aggressive, young talent into his organization, meaning Harold Rosen and

myself. He thought we would of great benefit to the organization under his direction and guidance.

Q And prior to the acquisition was there any discussion as to how that talent might be put to use, in what ways? Would you continue --

THE COURT: This all seems like a lot of fishing. If you want to ask the witness, and I take it this is your question, ask him to what use did he want to put this aggressive talent. What use was he going to put this aggressive talent to?

THE WITNESS: Well, our expertise, Harold Rosen and myself, was in the missy sweater and knitwear business. Mr. Elowsky thought we could, as I said, under his guidance and direction, build up a good, strong missy sportswear and knitwear business.

Q Mr. Jaffe, you previously testified that you first had discussions with Mr. Elowsky and Mr. Rosen, and you were the three officers, about entering the junior wear line in April, 1970. Can you tell us what the substance of those discussions was and how they progressed, if the discussions were continuing, how they progressed throughout the following months. What did you talk about in April, 1970?

A Well, in April, 1970 I say that we were

having a lot of general discussions about how we can expand our volume and diversify and strengthen our business. We had discussed about possibly going into the dress business, possibly going into the junior business and possibly going further into our importing business. We had various discussions at various times. There was no time where it was a continuous discussion day after day after day.

Q I understand. In November of 1969 did your discussions with respect to junior wear take on any different character?

A November of --

THE COURT: Where are we. You say November of 1969?

MR. KARAS: That's right.

THE COURT: I thought we were talking about '70. Are you talking about '69?

THE WITNESS: Originally we were talking about 1969, prior to this.

MR. KARAS: Mr. Jaffe, your Honor, testified that they first --

THE COURT: Don't tell me what he testified to. That's in the record. I want to get the days straight. You asked about November, 1969.

MR. KARAS: I am going in chronological progression.

Q The Women's Wear article of November 12th, is that an accurate article, an accurate news article?

A Well, I would say it was accurate. I was going to add, because, as I mentioned before, I always tried to embellish all publicity that we get to make us look like a wide-awake, aggressive firm, a good firm to do business with.

Q Were you a wide-awake, aggressive firm?

A I think we were.

Q Well, the article then was accurate, is that correct?

THE COURT: I don't care about whether it was accurate or not. The question is you have been all through that. You stated this to the reporter and they were indicated to be in this junior wear business, is that correct?

THE WITNESS That is right.

Q The article says -- well, you are quoted in the article as saying that you are working on plans -- that is, along with Mr. Elowsky -- are working on plans to open a junior operation. What plans were you working on at that time?

A Well, I would say that was one of the things when I used the word "embellish" when I described that article. We had no specific plans, just conversations from time to time that that was one area of business that we should eventually get into.

THE COURT: When you said the junior operation, you are quoted as saying coming in the not too distant future. Did you tell them that?

THE WITNESS: If it is in there, I must have.

THE COURT: There is a quotation mark. What did you mean by that?

THE WITNESS: Well, as soon as the opportunity presented itself, and we hoped it would be in the not too distant future, and I couldn't put a time frame on it, whether it would be one year, two years or three years. But we did have it in for a long time.

THE COURT: You are quoting Mr. Elowsky as saying "This is something we wanted for a long time"; what about that?

THE WITNESS: Well, he was in the business for a long time and he sold out --

THE COURT: What did you mean by his

saying he wanted it for a long time?

THE WITNESS: Well, he sold out --

THE COURT: But when you told the reporter this is something that Elowsky "wanted for a long time, what did you mean by that, a long time?

THE WITNESS: Well, ever since he was out of the unior sportswear business he always wanted to get back into it.

Q And he couldn't get back into it because --

THE COURT: Never mind all that.

Q If you would refer, please, to the March agreement --

THE COURT: Which one?

MR. KARAS: March 10th shareholders' agreement, 1969.

Q I refer you, Mr. Jaffe, to the unnumbered page between pages 22 and 23. Would you take a moment to read that, please.

A Yes.

Q Do you recall the purpose of that provision?

A No, actually not. I do not recall -- the only possible thing I could think of is that --

THE COURT: Don't speculate --

THE WITNESS: I would only be speculating.

THE COURT: Don't speculate.

THE WITNESS: I don't know the purpose of this.

Q Now, if you would refer to paragraph 20, which appears on page 23.

A Yes, I have read the article.

Q Can you explain to us why you agreed in paragraph 20 to vote your shares to approve any request that Mr. Elowsky may make to buy the common shares of stockholders other than the Morrison group for a certain period of time?

A Well, at the time we were negotiating with Mr. Elowsky -- I say "we," I am talking Morrison Knitwear Company -- we were not in too good a bargaining position to insist on any specific terms that would be 100 per cent beneficial to us. As long as he wanted this provision, and we didn't see how it would hurt us in any way, we decided to go along with it.

THE COURT: You say it didn't concern you?

THE WITNESS: Right.

Q You are an accountant, Mr. Jaffe. The

provision says that Mr. Elowsky has the right to purchase certain shares at book value.

MR. KUBA: Objection.

THE COURT: There is too much talk about characterizing these agreements. The point is, you say, this clause didn't concern you because it wouldn't affect your stock.

THE WITNESS: Exactly.

THE COURT: I don't see why we need further discussion on this.

MR. KARAS: The point is, your Honor, that to the extent that the purchase of outside stock, $473,000 worth, depletes the working capital, the liquidity of the company --

THE COURT: He said he didn't care.

Q Did you care about the liquidity of the company, Mr. Jaffe?

A We thought we could operate successfully without that money. We decided it is no problem for us.

Q Did you think it might be a good investment for the --

THE COURT: I will sustain an objection as to what he thought.

MR. KARAS: With your indulgence, your Honor.

(Pause.)

MR. KARAS: We have no further questions of this witness.

THE COURT: Any other questions of this witness on redirect.

MR. KUBA: No redirect, your Honor.

THE COURT: Thank you. You are excused.

(Witness excused.)

MR. KUBA: Our next witness will be Mr. S. M. Elowsky.

MR. KARAS: Your Honor, is it appropriate to take five minutes right now?

THE COURT: Swear the witness. You fellows obviously have never been in court before.

S A M U E L M. E L O W S K Y, a defendant herein, called as a witness by defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KUBA:

Q Mr. Elowsky, what offices do you hold with Apparel Industries?

A Chairman of the board.

Q At the time of plaintiff's stock sales, March, 1969 to January, 1970, what positions did you hold with the company?

A I held the position of president of Apparel Industries, president of Sport Teams, president of --

Q You are referring to the various subsidiary corporations?

A That is correct.

Q In other words, at the time of plaintiff's stock sales you were the chief executive officer of Apparel?

A That is correct.

Q Do you hold any positions in the apparel industry as such?

A At the present time?

THE COURT: No. Let's talk about 1969 and '70.

A I mentioned before I was president.

Q Outside of Apparel, did you hold other directorships and other positions in the industry?

A Well, I was honorary president of the National Skirt Association, which I formed in 1933.

THE COURT: National what?

THE WITNESS: National Skirt and Sportswear

Association. Also I was director of the Trade Bank and National Bank of North America. Also, I was honorary vice president of Kingsbrook Jewish Medical Center.

Q Are you still a director of the National Bank of North America?

A No, sir.

MR. KARAS: I object to this line of questioning.

THE COURT: It's all right. I'll accept it. It is merely background.

Q You are no longer a director of the Bank of North America?

A That is correct. I'm also president of the American Boys' Town -- rather, chairman of the board of Boys' Town. Also, I was cited by the mayor recently --

THE COURT: We're talking '69 and '70. I'm glad you recite it but I don't think it is relevant.

THE WITNESS: All right, your Honor.

Q Firstly, Mr. Elowsky, yesterday you heard the testimony of the plaintiff, Mr. Harkavy. He testified that he was a long-time employee of Apparel and at the time that he left the employment in June, 1968, other than his stock interest in the company, he

received no compensation whatsoever, is that accurate?

A That is correct, sir. He was well paid while he was working for us.

Q In other words, it was his testimony --

THE COURT: All right, let's stop that. He said he didn't get any severance pay and you said that is right, is that right?

THE WITNESS: That is right. In lieu of that we gave him an opportunity. He wanted to go in business for himself. We gave him an opportunity to buy the plant at Herkimer, New York, which consists of about 60 to 70 machines. A very nominal sum of $15,000 and a value of almost $50,000, plus 50 experienced operators

--

THE COURT: You said 15 experienced operators.

THE WITNESS: Fifty experienced operators.

THE COURT: They were the employees up in Herkimer. They didn't have much choice?

THE WITNESS: Right.

THE COURT: They went along with the machines; they didn't have much choice.

THE WITNESS: Usually you don't get that.

THE COURT: You were closing down and he said he would like to get some business.

THE WITNESS: No, we were closing down and we were trying to make it agreeable for him. The compensation would not have compensated more than what we were doing for him.

We also provided a very cheap lease.

THE COURT: You mean a lease from Apparel to him for the plant?

THE WITNESS: No, the lease of Kordeen to him for a nominal sum of $15,000.

THE COURT: Kordeen had the lease or owned the plant?

THE WITNESS: Owned the plant.

THE COURT: So that Kordeen leased the plant to him for how long a period of time?

THE WITNESS: A period of five years -- pardon me -- Kordeen had no right to release it. Herkimer Industries, the owner of the building, leased him the building.

Q You had an interest in Herkimer Industries, didn't you?

A Yes, I did. I was president. Also I want to relate the fact that this lease gave him a

time to pay out on very moderate terms. When the lease was terminated we think he got a substantial price because the building -- in the interim, while he was in the premises the people who bought the building were Mohawk Data Industries. They in turn negotiated with him, I don't know the terms, to give him some kind of consideration for the term ending his lease.

Q Mr. Elowsky, you have heard Mr. Harkavy's testimony as to what happened when he met with you in New York City in March, 1969 and the discussions concerning the purchase of his shares of stock in Apparel. Would you please tell the court what in fact happened when Mr. Harkavy --

THE COURT: I sustain objection to the form of that question. But I would like to ask, Mr. Elowsky, you did meet with Mr. Harkavy, did you, regarding this 366 shares --

THE WITNESS: 3366 shares.

THE COURT: That was in all.

THE WITNESS: Well, all the stock was dealt with at the same time.

THE COURT: Tell us about selling of the stock.

THE WITNESS: Mr. Harkavy, was keeping abreast with everything with regard to the purchase of House of Morrison. When he heard the purchase was definitely made he asked to come down to see me in New York that he wanted to sell his stock. That was about some time in the early part of March, 1969. He was aware that we purchased some stock by a relative of his by the name of Norman Jacobs for a price of $3.50 per share.

MR. KARAS: Would you request the witness to speak up.

THE COURT: I think he is doing his best. Do speak up a little more, if you can.

THE WITNESS: It is hard enough because I'm not such a young man any more.

THE COURT: You and I both.

He knew that you had purchased some stock from Jacobs at $3.50?

THE WITNESS: That is correct.

THE COURT: Go ahead.

THE WITNESS: He asked me whether he can get a better price than 3.50. I said, "If you feel that way I will give you $4 for your stock. I suggest you give me the stock now and you give me three

1 jpa40 Elowsky-direct
2 certificates amounting to 3366 shares. I suggest
3 to you, in view of the fact that we have a definite
4 price and the price we are going to pay Morrison, that you
5 only sell me 366 shares and keep the other 3000 share.
6 You will always get $4. Whatever price I get from
7 Morrison, I will see that you get."
8 Q What did Mr. Harkavy say to that?
9 A He was glad to take it because he needed
10 money and he was glad to take it. He took my advice.
11 He saw I was working for him and not for myself.
12 Q In other words, he gave you the certifi-
13 cates for all his shares?
14 A All the shares.
15 Q And he only --
16 THE COURT: I think the testimony was you
17 had the certificate of all the shares which you purchased,
18 366, at that time, and you held the rest of them.
19 THE WITNESS: I held the rest of them.
20 Q Then what happened?
21 A Well, the time passed and of course the
22 deal was made with Morrison.
23 Q Did Mr. Harkavy communicate with you?
24 A From time to time he communicated with me
25 and asked me how things were because he had the 3000

shares with me. I told him how conditions were.

THE COURT: How were conditions? What did you tell him about the conditions?

THE WITNESS: I had to tell him they were no good for one reason. We closed the plants up at Utica and Herkimer because we lost money in 1967 and 1968, in those years.

THE COURT: You told him business was no good?

THE WITNESS: Yes. He probably knew in his own mind that we would have to close up.

THE COURT: But you told him it was no good?

THE WITNESS: Yes.

Q Then there came a time when you told Mr. Harkavy that the Morrison Knitwear, the purchase had been finalized?

A That is correct.

Q How did that take place?

A He telephoned me in the early part of January, "Shall I come down now that you have got the price arranged?"

I said, "By all means."

He asked me the price, and I told him $4.43,

and I paid him for the shares.

Q Did you have any discussion with him at the time concerning the contemporaneous purchase of Hannah Rosen's shares?

A No, there was no occasion for it.

THE COURT: You don't recall it, anyway?

THE WITNESS: Well, I do recall I purchased them.

THE COURT: The question is, do you recall, was there any discussion about that with Mr. Harkavy? Do you remember discussing that with Mr. Harkavy?

THE WITNESS: I told him I paid 4.43 for the shares.

THE COURT: Did you tell Harkavy that?

THE WITNESS: Definitely.

Q What were the circumstances surrounding Hannah Rosen's purchase? Did you solicit the purchase of the shares or was she interested and did she come to you?

A She was a widow and she was interested in disposing of her shares.

Q How did she acquire her shares?

A By the absorption of the House of Morrison into Apparel.

Q She was a signatory party to the shareholders agreement of March, 1969?

A That is right.

Q Under that agreement if she desired to sell her stock Apparel had the right of first refusal to buy it at book?

A Correct, sir.

Q You are saying that's what happened in January, 1970?

A Well, it is really the end of December, but of course we paid her probably in the monty of January.

Q Then Mr. Harkavy, did he come into New York in January, 1970 and again meet with you to complete the purchase of his shares?

A As I told you, he called me up whether he could come in. I said, "By all means, come in." The deal with the House of Morrison stock and to purchase at 4.43 was consummated.

Q When he came in exactly what happened? Did you give him a check or what did he say to you or what did you say to him?

A As long as he knew the price. Of course, he came in my office. I said, "You have 3000 shares, the price is $4.43. I will give you $10,000 on

account and the balance I'll probably mail to you."

I paid him the $10,000 at that time.

THE COURT: Was that a check?

THE WITNESS: Yes.

Q Did Mr. Harkavy, during his discussions with you, make any mention of his business operations in Herkimer, New York and how they were faring?

A Well, we discussed that and he said things were not so good with him and --

THE COURT: He said things were not so good with him, and you said things were not so good with you, is that correct?

THE WITNESS: That is correct.

THE COURT: They must have been delightful conversations.

THE WITNESS: Yes, it was a mutual understanding between us.

Q Incidentally, Mr. Harkavy testified yesterday that in October, 1971 you gave him $2000 as severance pay. Is that true?

A I beg your pardon. There was no severance fee. This was given by another corporation because his wife came up and asked what could I do for them. I took a check out from Herkimer and I gave him the

check for $2000. Being a relative and knowing the circumstances he was in, I gave him the $2000.

Q In other words, no consideration?

A No consideration.

Q Did either Mr. Harkavy or his wife make any objections with regard to the stock sales in March, 1969 or January, 1970 at that time?

A She said nothing about that.

Q And said nothing about the other causes of action in this complaint which were dismissed?

A Well, I don't recall that conversation.

Q Mr. Elowsky, during the period that the sales took place, March, 1969 and January, 1970, did Apparel have any plans to go public?

A None.

THE COURT: You were in this, what do you call it, junior sportswear?

THE WITNESS: Junior sportswear.

THE COURT: You sold out once?

THE WITNESS: Yes, to Russ Togs.

THE COURT: And you had an agreement not to compete?

THE WITNESS: Four years.

THE COURT: And then you went back into

it?

THE WITNESS: Not after four years, a little later.

THE COURT: Were you thinking about that all this time?

THE WITNESS: All the time.

THE COURT: You like to get into that business.

THE WITNESS: I was the boss of sales in junior sportswear before I sold it to Russ Togs.

THE COURT: Did you ever talk to Mr. Harkavy about getting into this line?

THE WITNESS: No, I had no occasion to.

THE COURT: But you were thinking about it.

THE WITNESS: It is part of my life.

THE COURT: When did it develop that you did get into it.

THE WITNESS: Well, I was talking to Mr. Jaffe constantly, and I indicated to him I wanted to get back into that particular field. I said, "Well, let me" --

THE COURT: When did Jaffe arrive with the House of Morrison, is that right?

THE WITNESS: That is right.

THE COURT: That was when?

THE WITNESS: '69.

THE COURT: Before that you didn't talk to him.

THE WITNESS: He wasn't there.

THE COURT: When he came you talked to him.

THE WITNESS: I spoke to him and I spoke to Mr. Rosen about when I go back to the field I was accustomed to be in. At that particular time I was running four different divisions. I ran the House of Derby and I ran the Junior Range. I was very familiar with all the operations in that field, especially the junior field.

THE COURT: Did you and Jaffe work out any plans on this thing when he first came from Morrison?

THE WITNESS: Not at the start. But during the time he was employed with us we spoke about going back to that particular field.

THE COURT: When did you finally go back into that field.

THE WITNESS: I engaged Mr. Grey.

THE COURT: Do you remember when that

was?

THE WITNESS: Some time in the month of April, 1970.

THE COURT: April, 1970. All right. What was Mr. Grey supposed to do.

THE WITNESS: Mr. Grey was the star salesman for the House of Pants and he was a designer. His job was in designing and selling goods. I was the financial man and production man at that time.

THE COURT: Did you talk to him about this junior line? Did you talk to him about the junior line?

THE WITNESS: Yes, we did.

THE COURT: What happened about that?

THE WITNESS: That took a little time before it really developed because it was about three months later.

THE COURT: Three months after he came.

THE WITNESS: After three months he came in, Mr. Bag was working with me in the junior line. After Mr. Bag came in, some time in the month of June, that we discussed at great length why not going back to the junior field.

THE COURT: Who was there?

THE WITNESS: Mr. Grey, myself and Mr. Jaffe.

THE COURT: The three of you?

THE WITNESS: Maybe Mr. Rosen too.

THE COURT: You became very active at that point?

THE WITNESS: They became quite active It took a little while to get it on its way.

THE COURT: When did youfinally get it on its way.

THE WITNESS: Somewhere around the month of August, September, nobody knew the name of our concern and we had to work very fast, if you wanted to have any sales at all during that period of the year. Our creditors treated us good. I had all the manufacturing facilities to produce goods at a very fast order. So it was no trouble for us to get out any style that we presented, to get out in three or four weeks.

THE COURT: Where did you manufacture this line?

THE WITNESS: In New York.

THE COURT: In New York?

THE WITNESS: Yes, we had quite a number

of plans.

THE COURT: New York and where else?

THE WITNESS: Pennsylvania.

THE COURT: I think we can take our morning recess.

(Recess.)

(In open court.)

BY MR. KUBA:

Q Mr. Elowsky, in other words, is it correct to say that during the period that the two stock sales to Mr. Harkavy took place, that you had no specific information concerning Apparel's plans to reenter --

THE COURT: I sustained an objection to that question. I think the witness has said that at the time of these sales you always had been thinking about this junior line --

THE WITNESS: That is correct.

THE COURT: You always had been thinking about that. You testified when you talked to Harkavy about selling stock. That I gather was before Grey and Bag had come on board, is that right, sir?

THE WITNESS: That's correct.

THE COURT: Did you ever talk to Harkavy about your interest in the junior line?

THE WITNESS: He knew I was interested in junior when I first ran the business.

THE COURT: He had been with you all that time?

THE WITNESS: Yes, he was.

THE COURT: All right.

BY MR. KUBA:

Q Mr. Elowsky, I hand you Defendants' Exhibit A. This has not been received in evidence, and that's the right of first refusal letter in 1946.

MR. KUBA: I would assume you have no objection to it being received.

(Defendants' Exhibit A was received in evidence.)

xx Q What was the purpose of this letter?

A In case Mr. Harkavy wanted to leave at any time he would give me first preference to buy his stock.

THE COURT: What stock did that cover?

THE WITNESS: That covered Apparel stock.

THE COURT: All right. It will be received. Let me take a look at it.

According to this, it indicates that it is Kordeen stock, Kordeen Manufacturing.

THE WITNESS: Kordeen was part of Apparel.

MR. KUBA: There was a plan of reorganization between Kordeen --

THE COURT: All I want to straighten out is that this letter was agreed to by Mr. Harkavy to give Kordeen the right of first refusal on his Kordeen stock, is that right?

THE WITNESS: He had Kordeen stock and then he got Apparel.

THE COURT: I understand that. But this thing was before he got any Apparel stock.

THE WITNESS: Could I have the date, please, your Honor?

MR. KUBA: That is correct. It is dated 1/46, and at that time it was a wholly-owned subsidiary of Apparel.

THE COURT: In other words, I understand that Mr. Harkavy's contention is that this didn't apply to his Apparel stock.

MR. KUBA: I believe argument which is one of law is that it stood in its place.

THE COURT: You think what?

MR. KUBA: That the apparel stock was a substitute for the Kordeen stock under the plan of re-

organization.

THE COURT: To which he consented.

MR. KUBA: To which Mr. Harkavy consented and that's in the pretrial order, yes, your Honor.

Q Mr. Elowsky, during the year 1970 did Apparel Industries retain the firm of Rogaff & Chanin as its accountants?

A Yes, indeed.

Q Did they prepare a report on the books and records of Apparel and its subsidiaries for that year?

A They did.

MR. KUBA: I will mark this as Defendants' Exhibit No. -- I believe I discussed with you about receiving this in evidence. We can so stiuplate.

(Defendants' Exhibit E was marked for identification.)

xx MR. KARAS: Your Honor, at this point we had a discussion with counsel this morning that we neglected to mention to you this morning. We have stipulated that all the exhibits that we had marked for identification yesterday, that there would be no objection to it on the part of the plaintiff. We will assume they are received.

THE COURT: Yes, they are received.

(Plaintiffs' Exhibit E was received in evidence.)

Q Mr. Elowsky, I refer you to consolidated statement of income which appears as an exhibit to that financial statement. For the year 1970 in which subsidiary of Apparel were the Trousers Up operations conducted?

A Under Kordeen.

Q Under Kordeen. Does Exhibit B show that Kordeen's contributions to the earnings of the corporation for that year amounted to some $18,448 out of $246,820? Is that correct?

A The accountant prepared it and that would be correct.

Q Was there any other business operations in Kordeen during the year 1970?

A This was the only business.

Q During the year 1970 the contributions to earnings from Trousers Up operation, was that a significant portion?

A A very insignificant. It first came in the month of July or August. For the short period of time what they did was getting a new line out. I

was glad to make the $18,000.

Q Mr. Elowsky, were you in a position to guess in January, 1970or, for that matter, in the summer of 1970 that Trousers Up -- that the Trousers Up product line would prove to be a profitable one?

THE COURT: You are asking was he in the poistion to guess. I don't know about being in the position to guess. You were in business for profit and you hoped all these lines would improve, is that right?

THE WITNESS: Yes, but it takes time to get them off the ground.

THE COURT: But you were optimistic except when you were talking to Mr. Harkavy.

THE WITNESS: I only tell the truth.

THE COURT: You only tell the truth. Okay.

Q Mr. Elowsky, are you familiar with the stockholders' agreement with the House of Morrison shareholders and yourself of March 10, 1969?

A Yes.

Q May I refer you to page 23 in the rider that is annexed to that page?

A Could I ask you to please tell me the con-

tents of what you want to find out.

Q Paragraph 20, Mr. Elowsky, provides that at any time after April 1, 1970, at your request, Apparel would redeem or purchase from the present shareholders of Apparel, other than the House of Morrison stockholders, common shares to the extent of the amount of $473,000, which would be equal to the book value at the end of the calendar quarter in which a certain notice is given. It also provides that you have the right at any time prior to January 1, 1970 to dispose of up to 20,000 common shares as in your sole discretion you would determine, free of all the restrictions of the shareholders agreement

Can you tell us first whether you exercised any of your rights under that agreement?

A I never exercised it.

Q What was the purpose of it?

A They wanted me to be sure of what I paid into Morrison.

Q The figure $473,000 isn't an arbitrary figure. What does it represent?

A It represents what I paid for the Morrison business.

THE COURT: Am I clear you never exer-

cised the right under paragraph 20, that's the 437,000, or you never exercised the right under the 20,000?

THE WITNESS: That is correct.

THE COURT: Which one?

THE WITNESS: Both.

Q Was the purpose of paragraph 20 with respect to your shares and those of your family or did it refer -- was it intended to refer to the minority shareholders of Apparel Corporation?

A My family probably controlled the organization before the House of Morrison got into the picture. It was myself and my family's stock.

Q Did you conspire with Mr. Jaffe --

THE COURT: Let's not get all these conspires in. It doesn't help me at all. I know what the answer is going to be and it is of no help at all.

Q Did you have any help from Mr. Jaffe or any of the other signatories of the shareholders' agreement concerning the buying out of the minority stockholders of Apparel at the time this agreement was negotiated or at any time?

A What date was that?

Q March 10, 1969.

A Yes, we consider contemplating the purchase, the conversation I had with Mr. Harkavy about buying his shares.

Q I'm sorry. My question was had you had any discussions with Max Jaffe or any of the signatory parties to this shareholders' agreement concerning buying out the minority stockholders of the corporation?

A I had no conversation with them.

THE COURT: You say no conversation?

THE WITNESS: No.

Q Did you in fact buy after March, 1970, buy out the minority shareholders of Apparel Industries?

A After March, yes, we did, or, rather, I did. I did it voluntarily to myself because the deal with Morrison took place a little later than March 10th.

MR. KARAS: The witness answered the question. Could you excuse me? I didn't hear the answer.

THE WITNESS: Repeat the answer, please.

MR. KARAS: Your Honor, could the reporter be instructed to read back Mr. Elowsky's answer?

THE COURT: All right. Read it back.

(Record read.)

Q. I didn't understand your answer.

A March 10th was the date we fixed the price up. The negotiation had to take place on account of inventory-taking, and later we had a confirmation of what the value was, later than March 10th.

Q You're talking about the determination of the value of the stock under the shareholders agreement in the plan and agreement of reorganization?

A That's correct.

Q My question to you did not relate to that. My question was whether you had taken any steps, yourself individually, to buy out the minority stockholders of Apparel, allegedly Mr. Harkavy, Anna Reiss and Hannah Rosen.

THE COURT: When?

MR. KUBA: At any time between March, 1969 and January, 1970.

A We had discussions about that.

THE COURT: I can't hear your answer.

THE WITNESS: I said we had discussions about that.

THE COURT: The question is did you buy them out.

THE WITNESS: I did.

THE COURT: In that period?

THE WITNESS: In that period.

Q With regard to Hannah Rosen, please tell me the circumstances: did you buy the shares out?

A I personally bought nothing. The corporation bought the stock.

Q Did Hannah Rosen come to you or did you come to her. What were the circumstances concerning the buy-out of her shares?

A I think you asked that question before about buying her stock out.

Q Could you answer it again. Was she a signatory party to the shareholders' agreement?

A She was.

Q Was she interested in selling her shares?

A She was.

Q Did she come to you to ask her to buy out?

A Yes.

Q Did you solicit the purchase or was it voluntary --

MR. KARAS: I object to the relevancy of this question.

THE COURT: I have a question about that

too.

Q Did Mr. Harkavy initiate the stock sale to the --

THE COURT: Don't ask that question that way. That's another of those leading questions. In Harkavy's transaction who suggested that the stock be sold?

THE WITNESS: Mr. Harkavy.

THE COURT: When?

THE WITNESS: After the purchase was made by Norm Jacobs. He knows of the purchase that I made from Norm Jacobs. After that Harkavy came in and said he wished to sell his stock. He came in some time in the month of March.

THE COURT: 1969?

THE WITNESS: 1969. And of course we effected the purchase of the stock.

THE COURT: The answer to the question is he initiated it?

THE WITNESS: That's correct, sir.

Q Who initiated the Anna Reiss transaction?

A Mrs. Reiss.

Q What is Mrs. Reiss' relationship to you?

A Sister.

Q Are you familiar with the history of the treasury stock purchases of Apparel Industries during the period -- during the corporation's history?

THE COURT: Why are we getting into all of that? I don't see the relevance of that.

MR. KUBA: Well, I would like to -- in the pretrial order --

THE COURT: You fellows are worried about your pretrial order. What relevance has this got to do with the issues here?

MR. KUBA: There is a planned contraction of the shares, that is, a buyout of 10 per cent of the stock of the company, and we're trying to establish not only was there no planned contraction but that the stock sales were voluntary on the part of Apparel's shareholders during the period in question.

MR. KARAS: We are prepared to respond.

THE COURT: What's your point.

MR. KARAS: My point is that our position is not that there was a planned contraction but there was an actual transaction -- contraction of shares of over 10 per cent of the company in December, '69 and in January, '70 prior to the sale of the 3000 shares by Mr. Harkavy. It is an actual transaction

that did occur and we see no relevance to any evidence as to why it occurred.

THE COURT: All I gathered from the witness is that you did buy out during this period the shares of Mrs. Tannenbaum and Mrs. Rosen, is that right?

THE WITNESS: Tannenbaum Rosen, yes.

MR. KUBA: It is the same individual.

THE COURT: I understand. You say on each of these transactions they initiated it and you went along and bought it back.

THE WITNESS: That's correct.

MR. KARAS: The transaction with Mrs.Reiss, Mrs. Reiss is not a party to that agreement.

THE COURT: All right. Mrs. Reiss is not a party but you bought her stock.

THE WITNESS: That is correct.

THE COURT: The rest of this I don't understand. The fewer shares outstanding and the bigger majority of stock you kept.

THE WITNESS: Yes, sir.

THE COURT: I don't know why all this is being debated.

THE WITNESS: I didn't have it. I per-

sonally had to buy --

THE COURT: Do you recall any of these conversations with Mr. Harkavy that you ever discussed the question of possibly buying out minority shareholders?

THE WITNESS: No, I never discussed it with him.

MR. KUBA: If you have no objection I would like to mark in evidence the history, the statement of the treasury stock transactions.

THE COURT: I will sustain the objection to that question.

MR. KARAS: I object.

THE COURT: He objected and I sustain it.

MR. KUBA: I have no further questions at this time.

THE COURT: All right.

CROSS EXAMINATION

BY MR. KARAS:

Q Mr. Elowsky, what was the status of the plans to enter into the junior wear market in November, 1969?

A November of '69?

Q In November, 1969. Can you describe to us

what the status of the plans were, if any?

THE COURT: Is this the time of the Women's Wear piece?

MR. KARAS: This is the time of the Women's Wear Daily.

Q What was the status of those plans?

A The status of the plans was that the conversation Mr. Jaffe pressed on me. He said, "You were in the junior field before. Why don't you go back to it?"

Q Did you agree to it --

THE COURT: Well, he said he did.

Q Were you aware of this interview at the time? Did you see this Women's Wear Daily article?

A At the date it came out I did not see it.

Q When did you see it?

A It was called to my attention two or three days later.

Q I show you your affidavit dated the 22nd of April, 1975.

THE COURT: What are you doing? What's your question? Please, really. We are taking so much time.

MR.KARAS: The affidavit, Mr. Elowsky

states --

THE COURT: Are you calling his attention to a particular part of this affidavit and ask him if it refreshes his recollection or not? What are you doing?

MR. KARAS: He's made contradictory statements.

THE COURT: What is the question which relates to the affidavit, what answer are you relying upon?

MR. KARAS: The question is: did you in fact have and were working on plans in November, '69? The affidavit says just the opposite.

THE COURT: Wait a minute. Ask the witness, in November, 1969, when the Women's Wear piece came out that you saw three days later, what was the status of your plans regarding a junior department?

THE WITNESS: Just hoping to get into it.

THE COURT: Just talk.

THE WITNESS: Just talk.

THE COURT: Now, what do you want him to read in this affidavit?

Q Is it correct --

THE COURT: What part of the affidavit?

MR. KARAS: I am reading from page 9.

THE COURT: Page 9.

Q Would you refer to page 9.

A I can't read it.

THE COURT: Before you look at it, I want to see what you are asking here. What do you refer to on page 9.

MR. KARAS: The last full paragraph, the last sentence, your Honor.

THE COURT: There is nothing inconsistent with that. There is nothing inconsistent with that.

MR. KARAS: Also on page 10. The middle paragraph which begins "With the benefit of hindsight." Specifically, the last sentence of that paragraph.

THE COURT: You mean the sentence, "However, even assuming for the sake of argument that the corporate plans were in existence early in 1970," you say they were not, is that right?

THE WITNESS: They were not.

THE COURT: Any such information would have involved prediction and speculation, what about it?

MR. KARAS: Well, he is saying that

there were no corporate plans in existence in early 1970.

THE COURT: And he said that here and he said that in the affidavit.

THE WITNESS: And I will say it now again.

Q When was a corporation decision made to enter into the junior wear line and how was that accomplished, the corporate decision?

THE COURT: Well, there are a lot of questions. When did you go into the women -- excuse me -- the junior wear line?

THE WITNESS: After engaging Mr. Grey.

THE COURT: When was that, sir?

THE WITNESS: Some time in the latter part of April.

THE COURT: April, 1970?

THE WITNESS: April, 1970.

THE COURT: After he came in you worked out a plan to get into that line?

THE WITNESS: Yes. After that plan we engaged in in the month of June Mr. Bag came into the picture. Mr. Grey preceded him by three months making styles and everything else.

Q Let me follow up on that. Was Mr. Grey brought in in connection with you plans for a junior line?

A He was brought in primarily for junior as well as misses. We were already in the misses line under sport teams.

Q Let me ask you: was this the first act that you specifically took to enter into the junior wear line, the hiring of Bag -- excuse me -- the hiring of Mr. Grey?

THE COURT: Please think about these questions you are asking. We're just wasting time. As I understand it, you hired Grey in April and one of the purposes of hiring Grey was to see that he could go into the junior line, is that correct?

THE WITNESS: That's correct.

THE COURT: Then you say Bag came on about three months later?

THE WITNESS: Three months later.

THE COURT: When he came along you got going into the junior line?

THE WITNESS: Yes, because he had been familiar with the junior field.

THE COURT: All right.

MR. KARAS: If Mr. Grey --

THE COURT: You have got to get some questions that make sense. You just can't sit around and ask these long-winded questions. What is your question?

MR. KARAS: My question is -- well, Mr. Elowsky has testified --

THE COURT: Ask your question, please.

Q My question is: when did Apparel as a corporate entity make its definite plans to implement its decision to go into the junior wear line?

A Well, after Mr. Bag was in there for a few months.

THE COURT: Can you give a date?

THE WITNESS: Well, he came in in the month of June and from June and then on we went ahead knowing that we could rely upon Mr. Grey and Mr. Bag, that we could proceed along those lines.

Q Going back to the March -- to the December, 1969 and January, 1970 sales by Hannah Rosen and Anna Reiss, did you inform Mr. Harkavy as to how many shares were repurchased by Apparel in those transactions?

A I don't know whether he ever asked me that question.

jpa72 Blowsky-cross

THE COURT: That isn't the question. Did you inform him? You already testified some time ago on direct.

THE WITNESS: Yes, he knew about them. Because he wanted to get the same price --

THE COURT: He knew about it but you didn't say anything about it?

THE WITNESS: That's right.

THE COURT: All right. You say he knew about it because he wanted to get the same price.

Q Do you have any idea whether he knew about the number of shares that were being repurchased?

A I can't remember whether I told him toat or not.

Q Going to the March 10th agreement, there is a provision in there by which you reserve the right to sell 20,000 shares to -- to dispose of those shares as you see fit. What is the purpose --

THE COURT: He said he never exercised that. Is that correct?

THE WITNESS: Yes.

MR. KARAS: I believe it is relevant to --

THE COURT: No, he never exercised it.

Q On December 15, 1970 did you in fact --

did Apparel in fact redeem shares of your immediate family?

A Yes, they did.

THE COURT: This was in December of what year?

THE WITNESS: 1970, your Honor.

MR. KARAS: December 15, 1970.

Q Was any portion -- well, let me ask you this: those shares, were they purchased by Apparel at book value?

A I think so.

Q Were not those shares purchased in accordance with and by the terms of the March 10, 1969 agreement, specifically paragraph 20?

A I don't think I did that --

THE COURT: The answer is you don't think so?

THE WITNESS: I don't think so.

Q In the early '60s --

THE COURT: Let me get something straight. This purchase of shares in December, 1970 was from members of your own family, is that correct?

THE WITNESS: That's right.

THE COURT: Were any members of your own family part of this agreement of March 10th?

THE WITNESS: No.

Q Let me ask you something about the stockholders in the period 1969 and 1970. Aside from the Morrison group and aside from your immediate family, what other stockholders were there?

A Repeat that date, please.

Q In March, 1969.

A Yes, there were. Mr. Harkavy and my sister.

Q Do you consider your sister your immediate family?

A I do.

Q I say aside from the immediate family and aside from the Morrison group, which was acquired in March, 1969, and at that date, were there any other stockholders aside from the plaintiff, your immediate family and the Morrison group?

A Not that I recall.

Q Now, you had testified earlier that paragraph 20, which is the $473,000 that was set aside, that --

THE COURT: Again, these questions, I don't see anything in paragraph 20 that says anything about setting aside.

MR. KARAS: That allocates a -- well,

I just used that as a reference to refresh the witness' recollection.

THE COURT: I know, but you are asking the witness questions.

Q Well, you testified earlier that paragraph 20, that the purpose of that somehow ran to the benefit of your immediate family, is that correct?

A It probably would not be a benefit. I told you before these were never exercised.

Q I know that's what you told me. But paragraph 20, the purpose of that had to do with your immediate family?

A Evidently.

Q And paragraph 20 excluded by its terms the Morrison group, is that correct?

A That is right.

Q Who is left?

THE COURT: Wait a minute.

MR. KARAS: I withdraw the question.

Q In the early 1960s did Apparel have a plan to go public?

A In 1960?

Q In the early '60s.

MR. KUBA: Objection, your Honor.

THE COURT: I will sustain an objection. Are we going to go all over this ancient history. You want to get into this conversation up in Herkimer where you planned to go public. Do you remember that?

THE WITNESS: Yes.

THE COURT: I am sustaining the objection. Did you go public in 1960?

THE WITNESS: No, sir.

MR. KARAS: That was exactly the point, your Honor, that the defendant abandoned plans to go public in 1962 and yet in a 1969 agreement made provision for a sudden stockholder appointed by the underwriter in the event they went public. My question would have been whether that provision was put in there in anticipation.

THE COURT: No, no. I sustain the objection.

Q Did you ever disclose the March 10, 1969 agreement to Mr. Harkavy in any discussions you may have had with respect to the sale of his shares?

A Yes. Way back since '68 I was negotiating with him.

Q Yes, I understand that.

THE COURT: The question is: did you indicate to Mr. Harkavy the nature of this Morrison agreement? Is that the question?

MR. KARAS: That's right.

THE WITNESS: Yes, I spoke to him about it.

Q What did you tell Mr. Harkavy about the agreement, the stockholders agreement, of March 10, 1969, if you recall?

A He was advised maybe in the month -- in 1968 that I was trying to negotiate the purchase of the House of Morrison. The agreement followed the conversation as I indicated.

Q At the date of the prospectus, November 29, 1972, were all stockholders agreements cancelled that may have been in existence on that date?

A Well, that was a legal matter. I guess the attorneys took care of that.

Q Do you have any idea whether they were?

A We engaged attorneys for that very purpose.

THE COURT: The thing that bothers me, so what? This is long after these transactions.

MR. KARAS: It goes to the issue of damages, your Honor. That if Mr. Harkavy -- assuming

this liability of Harkavy -- if Harkavy had kept his stock, and assuming that the 1946 letter agreement with respect to book value were a valid agreement, that that agreemnt would have been cancelled in November, 1972.

THE COURT: All right.

BY MR. KARAS:

Q For how many years prior to 1964 was Mr. Bag an employee of yours?

A For a number of years. I don't recall how many?

Q A number of years?

A Yes.

Q Is Mr. Bag related to you?

A Yes, sir.

Q In what way?

A Nephew.

Q He's your nephew. When did you first approach Mr. Bag about his returning to Apparel?

A He approached me.

Q When did he do that?

A Some time in the month -- the early part of June --

THE COURT: What year?

THE WITNESS: 1970.

Q Mr. Elowsky, you had personally, did you not, a noncompete agreement with Russ Togs?

A I did, sir.

Q And that ran for how many years?

A Four years. It ended in '68, I think.

Q In '68. Was it extended in any way?

A Not to my knowledge.

THE COURT: What do you mean, was it extended?

MR. KARAS: Your Honor, Mr. Bag also had a similar free --

THE COURT: I don't give a hoot about that. What do you mean by extended in any way? Do you mean that Mr. Elowsky agreed not to compete for four years and say, oh, sure, I won't compete for another five years?

MR. KARAS: For another year. Because that's exactly what happened with Mr. Bag.

A I don't know what happened to him.

Q I understand that. I'm not asking you to testify as to him. I am asking you to testify as to yourself.

When you say Mr. Harkavy left all his shares with you prior -- well, when did he leave all his shares

with you?

A In March, 1969.

Q Is it before or after the Morrison acquisition?

A After the Morrison acquisition.

Q He left all his shares with you?

A All his shares.

Q Did he endorse those shares in your presence?

THE COURT: What difference does it make? He left them with you and you paid him for 366 at that time and you had the rest of them.

MR. KARAS: Mr. Harkavy takes issue with all of that.

THE COURT: I don't think there is any great issue, how the certificates were handed over. I really don't see it.

Q When were the first garments sold that Mr. Grey had designed when he came on board in April, 1970?

A I don't remember the date, but it was some time in July or August, I think.

Q Did you have some returns from those garments in August?

A I didn't take care of that end of it.

Q Mr. Elowsky, where did the fabric come from to produce these garments?

A It came from people who were converters or mills.

Q Was any of it in house, from other subsidiaries of Apparel?

A If there was there was very little.

THE COURT: You say there might have been?

THE WITNESS: There might have been.

Q What stock does the 1946 letter agreement, signed by Mr. Harkavy refer to?

A The stock he owned.

Q Yes, I understand. But the stock of what company?

A It may have been Kordeen.

Q Yes, thank you.

MR. KARAS: If I might have just one moment, your Honor.

THE COURT: All right.

(Pause.)

Q Mr. Elowsky, in March, 1969, when you acquired the House of Morrison, was the house of Morrison a profitable entity?

A When?

THE COURT: At the time you acquired it.

Q At the time you acquired it.

A Well, it had a going business and the main point I wanted to get at was to get the personnel.

Q That's not the question.

THE COURT: The question is when you acquired it was the House of Morrison a profitable business at the time you acquired it?

THE WITNESS: I don't think it was a profitable business in a large sense.

THE COURT: In a what?

THE WITNESS: Well, in a large sense.

Q Was it a losing proposition?

A I would say it was a borderline operation.

Q Was Apparel Industries at that time a profitable operation?

A What year.

Q In March, 1969.

A '69? No, we were probably losing some money then.

Q Referring again to the 1946 agreement, who drew up that --

THE COURT: What agreement?

MR. KARAS: The 1946 agreement with re-

spect to the --

Q Who drew up that agreement?

A I didn't.

THE COURT: You don't know?

THE WITNESS: I don't know. It must have been some lawyer or somebody else.

Q A lawyer employed by whom?

A I don't know. That's 30 years back.

Q You testified that the new line -- that you began selling garments from the new line in July or August, 1970?

A Right.

Q And you also testified that the line only realy started when Seymour Bag came in June, 1970, is that correct?

A That's not correct.

Q Would you explain how?

A Mr. Grey prepared the line and got everything ready and priced the line. After that was done Mr. Bag came in.

Q I see. So the work, the actual work, on producing the line, the cutting, the samples, began between the time that Mr. Grey came and the time that Mr. Bag came, is that right?

spect to the --

Q Who drew up that agreement?

A I didn't.

THE COURT: You don't know?

THE WITNESS: I don't know. It must have been some lawyer or somebody else.

Q A lawyer employed by whom?

A I don't know. That's 30 years back.

Q You testified that the new line -- that you began selling garments from the new line in July or August, 1970?

A Right.

Q And you also testified that the line only realy started when Seymour Bag came in June, 1970, is that correct?

A That's not correct.

Q Would you explain how?

A Mr. Grey prepared the line and got everything ready and priced the line. After that was done Mr. Bag came in.

Q I see. So the work, the actual work, on producing the line, the cutting, the samples, began between the time that Mr. Grey came and the time that Mr. Bag came, is that right?

spect to the --

Q Who drew up that agreement?

A I didn't.

THE COURT: You don't know?

THE WITNESS: I don't know. It must have been some lawyer or somebody else.

Q A lawyer employed by whom?

A I don't know. That's 30 years back.

Q You testified that the new line -- that you began selling garments from the new line in July or August, 1970?

A Right.

Q And you also testified that the line only realy started when Seymour Bag came in June, 1970, is that correct?

A That's not correct.

Q Would you explain how?

A Mr. Grey prepared the line and got everything ready and priced the line. After that was done Mr. Bag came in.

Q I see. So the work, the actual work, on producing the line, the cutting, the samples, began between the time that Mr. Grey came and the time that Mr. Bag came, is that right?

A That's correct.

MR. KARAS: No more questions, your Honor.

THE COURT: Any other questions?

MR. KUBA: Just on redirect a few questions.

REDIRECT EXAMINATION

BY MR. KUBA:

Q At the time of the stock sales in March, 1969 and January, 1970 what was your age, Mr. Elowsky?

A Let me go back.

MR. KARAS: I object to the question as having no relevance to the cross.

THE COURT: I don't think it has either but it is general knowledge.

A I was born in '92, your Honor.

Q You were approximately 77 or 78 at the time?

A About 77, yes.

Q At the time that you stated you informed Mr. Harkavy of the Morrison Knitwear transaction in March, 1969, and at that time was there a meeting of the shareholders and directors of Apparel Industries, Inc. which approved that transaction?

A There was.

Q Was Mr. Harkavy, the plaintiff in this action, given notice of that meeting?

A I don't recall.

Q Well, would this refresh your recollection (handing)?

MR. KARAS: May we see that, Mr. Kuba?

MR. KUBA: Yes.

A He surely was apprised of it by me. He couldn't attend.

MR. KUBA: Would you mark this for identification as Defendants' F.

(Defendants' Exhibit F was marked for identification.)

xx MR. KUBA: I offer this in evidence, your Honor.

MR. KARAS: Objection, your Honor.

MR. KUBA: It is a waiver of notice signed by Abner Harkavy with regard to the meeting of stockholders on March 10, 1969 which approved of the House of Morrison transaction.

MR. BROWN: Are you saying that those were two documents together?

MR. KUBA: In the minute book they were.

MR. BROWN: I asked you are those two

documents signed together. His seems a little different.

MR. KUBA: They were not.

THE COURT: I will receive this one. I won't receive this one. I don't know whether Mr. Harkavy saw this or not. I will receive this one.

(Defendants' Exhibit F was received in evidence.)

xx Q Mr. Elowsky, was Mr. Harkavy's transaction to sell 3000 shares of common stock approved by the board of directors of Apparel.

A I don't recall.

Q Would this refresh your recollection?

MR. KARAS: I don't see the relevance to this line of questioning, your Honor.

THE COURT: I will rule on that when he offers them.

A Evidently he got notice of it.

MR. KUBA: May we mark this for identification as the defendants' next exhibit.

(Defendants' Exhibit G was marked for identification.)

xx MR. KARAS: I have no objection to his offering it in evidence.

MR. KUBA: We will offer it in evidence.

(Defendants' Exhibit G was received in evidence.)

xx THE COURT: Let me see G, please.

Mr. Elowsky, who were the directors? It says the directors were present. Who were the directors?

THE WITNESS: The directors at that time were Mrs. Rosen, Mr. Jaffe and I think Mrs. Tannenbaum, or her name was Rosen -- Mrs. Tannenbaum-Rosen.

THE COURT: That says they were all present at that meeting.

THE WITNESS: That's right.

MR. KUBA: No further questions.

THE COURT: Any other questions.

MR. KARAS: No, your Honor.

THE COURT: You are excused, sir.

(Witness excused.)

MR. KUBA: Defendant calls Seymour Bag.

SEYMOUR M. BAG, called as a witness by defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KUBA:

Q Mr. Bag, what office do you hold with the Apparel Industries?

A President.

Q Will you please tell the court the circumstances surrounding your being employed by Apparel in June, 1970? When did you first meet with Mr. Elowsky to discuss your employment?

A Three days before I started. Some time early in June.

Q What was the substance of your conversation with Mr. Elowsky? What did he say to you and what did you say to him?

A Well, previously I was to go into business that following Monday morning with another gentleman. He was in partners with his father-in-law and his father-in-law decided that he wanted to take out money from the business and at that particular time I -- the money I was going to be putting into the business would be taken out, there would be very little capital left to operate.

So I gave them till that Sunday night at midnight to get back to me and give me an answer as to either we had a deal or we didn't have a deal. Already it was in the hands of the attorneys and their accountant. That happened that Friday morning.

As soon as I left their accountant or lawyer's office, I don't recall which one it was, I went over and I saw Mr. Elowsky and told him the circumstances. It was the first time I had discussed anything with him.

THE COURT: What relation is he to you?

THE WITNESS: He's my uncle.

A I explained to him the deal, and I said, "The deal looks like it won't go through."

Q Incidentally what was the name of the business that you were interested in buying?

A Lisa, L-i-s-a.

Q They are located here in New York?

A They were located. Subsequently they went bankrupt. I came in after I had left that meeting and I explained to him the situation. I said, "If I don't hear from them maybe we can do something."

He says, "Come in Monday morning," period, the end.

Monday morning I didn't receive a telephone call. It must have been about 9:30, 10 o'clock in the morning. I walked in and I said, "I'm here."

Q Had you met Dan Grey before that time?

A Never. That Monday morning.

THE COURT: What was the date again on this, if you remember?

THE WITNESS: June, the first week.

THE COURT: In 1970.

THE WITNESS: Up through possibly the 10th, I don'tremember exactly, your Honor.

Q Then what did you proceed to do in working with Apparel?

Q What type of work?

A Well, the first thing that happened Mr. Elowsky introduced the two of us together and said, "You two would be working together." Then we started to work together. We started to talk. I didn't know him and he didn't know me. So we discussed our backgrounds, what I had done and what he had done. He showed me what he had in the showroom. There must have been at that particular time maybe six, seven, eight, nine styles.

The two of us said, "Okay, let's go."

What does the word "Let's go" mean? The first thing we have to do is start the books in the business. I don't know if we had any books of business in the house at the time. Maybe 5000 or $6000, this business.

Since he knew a lot of people and I knew a lot of people, we got on the telephone to call people to let them know we were in business. In order to get it moving even faster, and since had just covered the State of Florida and knew a lot of people, he decided to go down to Florida and work in Florida three or four days and know what to cut and how many people to put to work. We started to cut the orders according to number. We went out and bought yardages of fabric that we needed for small cuttings and we proceeded from there each month to where we are today. It is simple.

Q Are you talking about the product line of Apparel, which is now known as the Trousers Up line?

A That's correct.

Q When was the first commercial use of the Trousers Up trade name. When did that take place?

A First commercial use must have been in the month of August when merchandise was shipped into the stores.

Q How much lead time did you and Mr. Grey require to complete shipment of the first -- the first shipment in August, 1970.

A July and August.

Q In other words, you only required two to three weeks' lead time to complete --

A Two, three, four weeks. I recollect our shipments were the last week of August, so we had actually the month of July and August, which is four or five weeks, because the first two weeks were vacation time in July, all the plants were closed. They were all small manufactured cuttings. They weren't big quantities.

Q Well, what happened? Did the sales continue -- could you please relate to me what subsequently happened?

A Subsequently at the end of July or some time in July we had people come into the showroom who we had contacted. We went out to different people in the local area. We started to aggressively sell the merchandise that we had and we started to style other merchandise to go ahead and sell as well. So by the time August came around, when people normally came into the market who we called throughout the country,

that particular time maybe we had 20 numbers. We were actively selling 20 numbers. Then we started to deliver.

Q In other words, no expenses were incurred in creating a market in the Trousers Up line until June or July, 1970?

A I wasn't there before so I wouldn't know anything before June. From June on I would know.

Q Was the Trousers Up line a significant portion of Apparel's business for that first year, 1970? Was it a small part of --

THE COURT: Don't keep telling him what the answer is.

What part of the business was it?

THE WITNESS: The percentage, I don't know. Maybe 25, 15 per cent, I don't know.

Q At the time that you first began work with Apparel did you have any discussions with Mr. Elowsky concerning your compensation?

A No, not until the month of July. I came and I started to work and I felt a check would come. A check came at the end, I guess it must have been at the end of July, and subsequently I started to get paid. There was no discussion as far as my salary was concerned.

It certainly was a lot less than what I was working.

THE COURT: You relied on Uncle Sam to see that you got paid?

THE WITNESS: No, I relied on my ability, your Honor.

Q Did you have any discussion with Mr. Elowsky concerning a stock equity?

A At the beginning, no.

Q When did you have a discussion with Mr. Elowsky concerning an equity interest in the company?

A Well, the discussions first took place -- I say "we" because I have to use this as when Mr. Grey and myself saw we had something that was moving and we certainly wanted to be a partner to this and we were only workers at that particular time. So this had to be some time at the end of September or early October when we possibly thought about it. So it might have been the end of October or November in which we discussed that something had to be done in order to make it worth while for us to go ahead and want to be with the company. We knew we could be successful together.

So it would have been either here or possibly we would have left it if the deal couldn't have been

made.

Q So what form did that stock participation take?

A What form? A recapitalization, if you want to use that word, recapitalization of the business. Because the amount of the net worth of the company at that particular time was just a little bit too great for Mr. Grey and myself to want to come into and have a significant portion of the business. So the capital structure was reduced with the consent of all the parties That was Mr. Rosen, Mr. Jaffe, Mr. Elowsky and myself to the capital structure that we started, which was $400,000.

Q That was all incorporated in --

A In agreements and documents and everything else.

Q That is described in the prospectus which we have had marked into evidence yesterday?

A I don't really know. That was the actual original capital in the business. The additional money was put in a preferred stock. The reason for that was,very, very honestly, Mr. Grey and myself, we wanted a bigger share in the profits and they always accumulate to common stock. But without the money

in the preferred stock the amount of capital in the business would not be significant for us to go ahead and move ahead the way we moved ahead.

Q How is the number of shares, 28,000 that you subscribed to?

A 10,000 shares at -- 20,000 shares at $5 a share is $100,000. My share was 25 per cent.

Q That's how the 20,000 was arrived at?

A Twenty times five. I invested $100,000. At that time the stock was $5 a share, December 31st, when the book value was determined, and if you multiply it out, 20 times five is $100,000.

MR. KUBA: May I just take a moment?

THE COURT: Yes. Let's move along. You can take a moment but not much longer.

MR. KUBA: No further questions.

THE COURT: Any questions?

MR. KARAS: Yes, your Honor.

CROSS EXAMINATION

BY MR. KARAS:

Q I would like you, Mr. Bag, to read into the record a portion of your --

THE COURT: Why do you want him to read into the record?

MR. KARAS: One question and one answer from his deposition.

THE COURT: Oh, no, no. Ask him the question, and if you get any inconsistent answer, then you can refresh his recollection. How many times Do I have to do this?

Q When did you commence discussions with Apparel or Mr. Elowsky about coming back to Apparel?

A I told you.

Q No, you didn't tell me.

THE COURT: You can answer that.

A It was early in June, possibly anywhere from the 1st through the 10th, on a Friday afternoon, when I explained to him that I had discussions with another company, and it might break off before I would go into business with these people because of the situation that existed.

Q Now, I show you pages 17 and 18 of your deposition, the last question which begins on page 17 and your answer which is on page 18.

Does that refresh your recollection?

A No, I don't understand it.

"At what date did you commence discussions with Apparel or any officer or director of Apparel re-

garding returning to Apparel?

"A It might have been some time in October or November."

I can answer that question and I can understand what it is. I see Mr. Kuba did not understand it.

Q You did not understand the question.

A I said I can answer this question. I was an employee of Apparel Industries from June 1st through 10th, through the time I had discussions about reentering and buying into Apparel Industries.

This October or November, I just answered a few minutes ago.

THE COURT: What you are saying --

THE WITNESS: I was an employee of the company.

THE COURT: You had a conversation with Mr. Elowsky in June and your answering a question with regard to getting some stock.

THE WITNESS: Yes, which I answered before.

Q What discussion did you have with Mr. Elowsky in October or November --

A That is 1970. That is not 1969, that is

1970.

Q That's not what the question said, however.

A I don't know what the question said. There is no date on the question.

Q The question says regarding --

THE COURT: Please. Don't argue with the witness.

Q How long were you with Mr. Elowsky's companies before the sale to Russ Togs?

A I worked for the companies going back through at the beginning of the war when I worked after school and I worked in the summertime all the way through my termination.

Q Did you sign a noncompete agreement in favor of Russ Togs upon the sale of Juniorite to Russ Togs?

A I must have. I was an officer of the company, so I assumed I may have signed a document.

Q Did you have an employment contract with Russ Togs?

A I had.

Q Did it have a restrictive covenant with respect to competition?

A I assume it did. I don't know.

Q What was the term of that contract, for how long was it?

A Four years.

Q Was it extended?

A It was extended for one year.

Q That would put the expiration date at --

THE COURT: Ask him when it would.

Q When does it expire?

A You tell me the date of the original contract and I will tell you when it expired. I don't remember.

Q Do you have a copy of your employment contract?

A No. The dates would coincide with the sale of Juniorite to Russ Togs or within a week or thereabouts.

Q Did you sign a general release -- was a general release signed in February, 1970 between yourself and Russ Togs?

A That I signed.

Q What was the purpose of that release?

A The purpose of that release, the company insisted that I sign a release for their protection that I wouldn't come back and possibly have any litiga-

tions against them myself.

Q When did you stop being an employee of Russ Togs?

A I would assume that date or a day before.

Q February, 1970?

A Yes.

Q Up until that date were you a day-to-day employee, going to your office?

A Day-to-day employee, that's correct.

Q Do you know -- well, you testified that when you came to Apparel Industries in 1970 Mr. Grey had a number of styles in the showroom. What were those styles? How would you characterize them?

A Pants.

Q Were those styles somehow different from what Apparel had been producing in the period '64 through --

THE COURT: How would he know all that?

MR. KARAS: Pardon.

THE COURT: How would he know?

MR. KARAS: Because he saw them.

THE COURT: He wasn't there in '64. I don't understand your question.

THE WITNESS: He's talking about when

I was with Juniorite in '64. No, it wasn't a part of Apparel in '64 either.

Q When you came on in June, 1970 did you not know what Apparel was producing, what your new employer was producing and what lines they had when you came aboard in June, 1970?

A Yes.

Q Did you know what lines, what the various lines that your new employer had.

A Of course I did. It is my business to know that.

Q Were Mr. Grey's designs which became the Trousers Up -- were those designs different, significantly different from the other lines? Was it junion wear? What was it?

A I don't understand your question. What other lines? That Mr. Elowsky had in his company?

Q That's right.

A This was different.

Q Could you tell us how?

A These were pants.

Q Did Apparel produce any other parts besides these?

A I don't know.

Q Do you recall whether or not there were any returns on Trousers Up garments in August?

A It doesn't seem possible when we started to ship at the end of August.

Q Was the name Trousers Up a trade name? Had that been established when you began your employment?

A Yes.

MR.KARAS: Thank you. No more questions.

THE COURT: Any other questions?

Thank you,you are excused, sir.

(Witness excused.)

MR. KUBA: Defendant calls Daniel Grey.

THE COURT: You have another witness. I will break for lunch and we will meet again at 2 o'clock.

MR. LEE: We don't wish to trespass on your Honor's time. You might want to know we expect very brief testimony on Mry Grey and you might be able to finish up at the rest of the day.

THE COURT: All right, put Mr. Grey on.

DANIEL GREY, called as a witness by defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KUBA:

Q Mr. Grey, what office do you hold with Apparel Industries, Inc.?

A Executive vice president.

Q Are you a member of the board of directors?

A Yes.

Q When did you first become employed with Apparel?

A End of April, early May, 1970.

Q Would you please tell the court the circumstances surrounding your employment? Did you come to Apparel or did Mr. Elowsky --

THE COURT: Please don't ask him. How did you join Apparel?

THE WITNESS: Well, prior to that I was a traveling salesman in Florida. At that time business became bad down there and I felt it was a good opportunity to come back to New York City where I came from and started in this business. That's why I came back. I met Mr. Elowsky through my father-in-law who has known

Mr. Elowsky, I don't know how many years, 20 years or 30 years. He's in the textile business. I was just looking around in the market to see what was doing, see if I could make a connection, because I felt there was something I could always do, even though I had no experience in that area, outside of selling.

So my father-in-law said to me, "Well, look, I know this man, his name is Mr. Elowsky. He has been in business many years and he has had many sportswear-type things. I will take you up there and introduce you to him."

I said fine. I never heard of him and I never knew him. We went up to his office and he said, "This is the fellow I told you about and I want you to meet him." That's how I met Mr. Elowsky.

I told Mr. Elowsky what I would like to do and he said, "It sounds good. Take a shot."

Q You started working for Apparel then, what is that, in late April, 1970?

A End of April, early May. I don't know the exact date. Would you

Q Would you please describe the work that you did?

A Well, I decided to put together a group of

fashion pants which were a little more stylized than what was in the market. I sampled up piece goods in the market of various fabrics that I thought were good at various ttyles and had the samples made up in the sample room. Then I had them priced and then started to sell them, or tried to sell them.

THE COURT: When did you complete the samples?

THE WITNESS: I don't know. Actually through to the end of summer.

THE COURT: End of the summer?

THE WITNESS: Yes.

Q When did you first meet Mr. Seymour Bag?

A The first day that he showed up in June.

Q The name Trousers Up, did you have anything to do with the creation of that name?

A Yes. I thought of that name.

Q And the trademark registration was filed for that name?

A Yes. I didn't have anything to do with the filing of name. Whoever was in the company at that time took care of it. But I was the one who created the name and decided to call the company Trousers Up.

Q The new product line, the style?

A Correct, the label.

Q You've heard Mr. Seymour Bag's testimony concerning the work that both of you did in developing this new product line. Do you join in Mr. Baq's testimony, is that accurate?

MR. KARAS: I object to the question.

THE COURT: I don't know about "join in" it.

A I agree with that testimony.

THE COURT: In other words, his testimony about what you were both doing during this period, that's what you would say if you were to testify about those events?

THE WITNESS: Correct.

MR. KUBA: No further questions, your Honor.

CROSS EXAMINATION

BY MR. KARAS:

Q Mr. Grey, did Mr. -- well, did you have any interviews wigh Mr. Elowsky before you were formally hired in April, 1970?

A None whatsoever.

Q You never met Mr. Elowsky -- well --

A I never met Mr. Elowsky.

Q The question is, prior to your first day of work, what meetings did you have with Mr. Elowsky?

A I might have met him the day before. In other words, you are asking me the day that I actually started work. I met him the day before.

Q No. Did you have any meetings with Mr. Elowsky prior to the first day you came to work?

A I said maybe the day before. Besides that, I never had any meetings with him.

Q Can you tell us what transpired at the meeting the day before or thereabouts?

THE COURT: All he wants to know, when your father-in-law brought you up to Elowsky's office, I take it, he said, "Here is a fellow who is looking around," and Mr. Elowsky talked to you,and he wants to know what Mr. Elowsky said and what you said, if you can recall.

THE WITNESS: We decided that day. He liked that idea.

THE COURT: Well, I think he's trying to get you to recall what did Elowsky say to you.

THE WITNESS: I don't remember exactly what he said to me, but the basic substance would be that "It wounds like a good idea and we'll give it a shot."

THE COURT: What did you propose to him?

THE WITNESS: I proposed to style and put together a fashion pants line which was similar to the product line of my old company, which was Mr. Pants, Incorporated, which was a double-ticket young missy pants line.

THE COURT: That's what you suggested to him and it sounded like a good idea and that was it?

THE WITNESS: That's correct.

Q What was the predicate for your suggesting? Was he looking for a man in the pants line, do you know?

THE COURT: Wait a minute. Let's not go through this. He said he told Mr. Elowsky what he had been doing and he suggested he wanted to put out this pants line, and he testified to this, and Elowsky said it was a good idea.

Q Did you have any returns in August, 1970 of garments produced -- garments that you designed?

A Not that I know of.

Q And when were the first sales of the garments that you designed?

A Some time in the summer months.

Q Can you be any more specific?

A July, June.

Q Now, so you had sales -- if you had sales in June, to whom would those sales be to, to buyers? How does that work?

A It would have to be retail stores.

MR. KARAS: No further questions, your Honor.

THE COURT: Any other questions?

MR. KUBA: No questions.

THE COURT: Thank you. You are excused.

(Witness excused.)

THE COURT: Are we through with witnesses now?

MR. KUBA: We have completed our defense, your Honor.

THE COURT: Whose depositions is it you wanted to read.

MR. KARAS: Mr. Elowsky's and Mr. Baq's, your Honor.

THE COURT: Well, I have heard from both of them.

Gentlemen, I have heard the testimony here and I don't find that the plaintiff has made out a case.

I would like the defendant to prepare some simple findings of fact and conclusions of law and submit them to me within five days.

MR. KUBA: Thank you, your Honor.

THE COURT: Plaintiff has not made out a case here. Okay. That's it.

MR. KARAS: Your Honor, may we be allowed to put in a memorandum on the point.

THE COURT: I don't think so. It is purely a factual matter and I don't think you have established it here.

- -

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Abner Harkavy	3	37		
Douglas H. B ellemore	46			
Max D. Jaffe	84	99		
Samuel M. Elowsky	112	143	162	
Seymour M. Bag	166	174		
Daniel Grey	182	185		

EXHIBIT INDEX

Plaintiff	Identification	In Evidence
1	18	
2	22	
3	23	
4	26	
5	54	
6	57	

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Joseph B. [illegible]

Official Court Reporter
U. S. District Court

Defendants		
A	39	130
B	41	
E	132	
F	163	164
G	164	165

OPINION OF BONSAL, D.J.
DATED FEBRUARY 17, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

ABNER HARKAVY,

Plaintiff,

-against-

73 Civ. 4764

APPAREL INDUSTRIES, INC. and
S. M. ELOWSKY,

45612

Defendants.

- -x

FEB 12 1 PM '77

GALLAND, KHARASCH, CALKINS & BROWN, ESQS.
40 Wall Street, New York, N.Y. 10005
Attorneys for Plaintiff
WILLIAM KARAS, ESQ.
DAVID S. BROWN, ESQ.
Of Counsel

WARSHAW, SYLVESTER, BURSTEIN & FRANKS, ESQS.
555 Fifth Avenue, New York, N.Y. 10017
Attorneys for Defendants
DONALD L. KUBA, ESQ.
CHARLES L. SYLVESTER, ESQ.
MARTIN R. LEE, ESQ.
Of Counsel

O P I N I O N

BONSAL, D. J.

This is a civil action tried to the Court involving alleged violations of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)) and Rule 10b-5 (17 C.F.R. §240.10b-5) promulgated thereunder. Plaintiff, a former shareholder of Apparel Industries, Inc. ("Apparel"), contends that the defendants Apparel,

a New York corporation engaged in the manufacturing of women's sportswear and knitwear, and S. M. Elowsky, the chief executive officer and controlling shareholder of Apparel, conspired and arranged for the purchase of plaintiff's Apparel stock in violation of the federal securities laws. Specifically, plaintiff contends that the defendants did not inform him at the time of his stock sales in March 1969 and January 1970 that Apparel was about to introduce a new junior wear line, that Apparel had purchased shares from other shareholders, and that Apparel had definite plans to make a public offering. Plaintiff seeks damages amounting to the difference between plaintiff's sale price and the highest fair market value of Apparel stock since the date of plaintiff's sales, adjusted to reflect a 9:1 stock split in 1972.

Factual Background

From the testimony and evidence produced at trial, it appears that plaintiff was employed by Kordeen Manufacturing Co., a corporation engaged in the sportswear and knitwear business in Herkimer, New York, from June 1945 to June 1968. Following a stock split and stock dividend, plaintiff owned 306 shares of Kordeen stock.

In August 1961, the shareholders of Kordeen, including plaintiff, entered into a plan of reorganization with defendant Apparel whereby the shareholders of Kordeen exchanged their shares for capital stock of Apparel on an 11:1 basis. Plaintiff, pursuant to the plan, exchanged his 306 shares of Kordeen for 3,366 shares

of Apparel. Kordeen remained a wholly-owned subsidiary of Apparel until it was merged with another wholly-owned subsidiary, Sporteens, Inc., in February 1971.

In March 1969 plaintiff sold to Apparel 366 shares of Apparel stock and received $1,464 representing a book value of $4.00 per share less stock transfer taxes. On January 15, 1970, plaintiff sold his remaining 3,000 shares to Apparel and received $13,245 in cash representing a book value of $4.43 per share less stock transfer taxes.

In March 1969, Apparel purchased the business of House of Morrison Knitwear, Inc. through an exchange of stock. Concurrently, Apparel entered into a first refusal agreement with the former shareholders of House of Morrison. A few days prior to plaintiff's 1970 sale, one of the signatories to that agreement, Hannah Rosen Tannenbaum, sold 41,500 shares to Apparel at a price of $4.43 per share, which was the negotiated book value under the first refusal agreement and was the price paid to plaintiff.

After the sale, Apparel employed Daniel Grey to begin work on a new junior wear line and, in June 1970, Apparel engaged the services of Seymour Bag to assist Mr. Grey in the development of this new line. Production of the new junior wear line commenced under the name "Trousers Up" during August 1970.

Almost three years after the sales, defendant Apparel filed a registration statement and preliminary prospectus with the Securities and Exchange Commission on November 29, 1972. The registration statement was voluntarily withdrawn on November 30, 1973

due to adverse market conditions.

Discussion

Plaintiff alleges that at the time he sold his 3,366 shares to Apparel in 1969-70, defendant S. M. Elowsky and other employees of Apparel knew, but failed to inform him, of major changes in the company including: (1) the fact that an individual previously employed by Apparel, Seymour Bag, had been reengaged to assume responsibility for the management, operation and development of a new line of Apparel clothing; (2) that a restructuring of Apparel's capitalization was planned which would have increased the ownership and value of plaintiff's equity if he had not been induced to sell; (3) that additional funds would be put into Apparel; and (4) that Apparel was at a financial turnaround.

In a securities case such as this, the plaintiff has the burden of establishing that defendants failed to reveal facts at the time of the stock slaes transactions which would have influenced a reasonable investor in determining whether or not to sell his shares. 15 U.S.C. §78j(b); see Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), cert. denied sub nom., 394 U.S. 976 (1969); Chelsea Associates v. Rapanos, 376 F.Supp. 929 (E.D. Mich. 1974); Ruszkowski v. Hugh Johnson & Co., 302 F.Supp. 1371 (W.D.N.Y. 1969); Rosen v. Bergman, 40 F.R.D. 19, 22 (S.D.N.Y. 1966).

Here, plaintiff testified that he was unaware of the

March 1969 agreement between Apparel and former shareholders of House of Morrison under which defendant Elowsky reserved the right to sell up to 20,000 shares of his common stock in Apparel at any time prior to January 1, 1970. In addition, plaintiff testified that he was not made aware of defendants' plans to re-enter the junior wear manufacturing and marketing business as announced in the November 12, 1969 edition of Women's Wear Daily.

According to the testimony of Max Jaffe, vice president of Apparel, and S. M. Elowsky, Apparel had no plans to market a junior wear line before the middle of 1970 when Seymour Bag re-joined Apparel. Moreover, according to the testimony of Elowsky, Apparel did not begin to promote a junior sportswear line until April 1970 when Daniel Grey was hired.

It is undisputed that Elowsky never exercised the right under the 1969 shareholders' agreement to sell 20,000 shares of Apparel stock to a third party. It is also undisputed that in December 1969 and January 1970 Apparel repurchased shares from former shareholders of House of Morrison for the agreed upon book value which was the price paid to plaintiff.

From all the testimony and evidence produced at trial, it appears that plaintiff voluntarily sold his shares of Apparel stock in March 1969 and January 1970 and that these purchases by Apparel did not violate the provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Plaintiff was related to defendant Elowsky; he had been associated with the defendants in a professional capacity for over

35 years; he was familiar with defendants' line of work; and he was knowledgeable of the market conditions in the field of women's sportswear and knitwear. Under all the circumstances, the Court finds that plaintiff has failed to prove a private cause of action under Section 10(b) by a preponderance of the evidence. See 15 U.S.C. §78j(b); see also Securities and Exchange Commission v. Texas Gulf Sulphur Co., supra, 401 F.2d 833; Gerstle v. Gamble-Skogmo, Inc., 298 F.Supp. 66, 97 (E.D.N.Y. 1969), modified, 478 F.2d 1281 (2d Cir. 1973).

Accordingly, judgment may be entered for the defendants.

The foregoing constitutes the Court's findings of fact and conclusions of law. Fed. R. Civ. P. 52(a).

Settle judgment on notice.

Dated: New York, N.Y.
February 17, 1977

Dick R. Bay

U. S. D. J.

JUDGMENT APPEALED FROM

U. S. DISTRICT COURT
FILED
MAR 8 1977
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

ABNER HARKAVY,

Plaintiff,

-against-

APPAREL INDUSTRIES, INC. and
S. M. ELOWSKY,

Defendants.

- -x

73 Civ. 4764 (DBB)

JUDGMENT

This action having come on to be tried before this Court, Hon. Dudley B. Bonsal, District Judge, presiding, and the evidence adduced by the parties having been heard, and the Court having made its findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED AND DECREED, that the complaint herein be and the same is hereby dismissed and that the defendants have and recover their costs to be taxed from the plaintiff. MA

Dated: March 7, 1977
At New York, N.Y.

Dudley B. Bonsal
U.S.D.J.

MA

JUDGMENT ENTERED — 3/8/77
Raymond F. Burghardt
CLERK

MICROFILM
MAR 8 1977

3/23/77 - No appearance in opposition. Bill of Costs, as taxed in the sum of $549.35, in favor of defendants, as against plaintiff, and added to the judgment.

35

Raymond F. Burghardt
CLERK

At a Slated Term of the United States District Court for the Southern District of New York, held in the United States Court House in the Borough of Manhattan, City of New York on the day of in the year of our Lord, One Thousand Nine Hundred and Seventy

PRESENT:
HONORABLE: DUDLEY B. BONSAL
United States District Judge.

ABNER HARKAVY
vs.
APPAREL INDUSTRIES INC
S.M. ELOWSKY

Docket No. 70 CIV 4174

Now comes the Plaintiff By GALLAND KHARASCH, CALKINS + BROWN BY WILLIAM KHARAS, DAVID BROWN

and moves the trial of this cause. Likewise comes the Defendant by WINSLOW, SYLVESTER BORSTEIN + FRANKS. BY DONALD KOBH, MARTIN LEE NEW YORK

Thereupon ~~a Jury is duly empaneled and sworn~~, and the cause proceeds to Trial. DEC 29 1976

DEC 30 1976 BOTH SIDES REST. DECISION OF COURT IN FAVOR OF DEFENDANTS, COUNSEL TO ~~E~~ SUBMIT FINDINGS OF FACT

BONSAL J.

(AN EXTRACT OF THE MINUTES)

FPI NI—11-6-69-1M-4162

Checked.

NOTICE OF APPEAL

FILED
APR 6 9 26 AM '77
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

ABNER HARKAVY, :

Plaintiff, :

- against - :

APPAREL INDUSTRIES, INC. and :
S. M. ELOWSKY, :

Defendents. :

- x

73 Civ. 4764 (DBB)

NOTICE OF APPEAL

Notice is hereby given that Abner Harkavy, the above named plaintiff, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 8th day of March, 1977.

Dated: April 5th, 1977
New York, New York

Austrian, Lance & Stewart

By _____
A Member of the Firm
Attorneys for Plaintiff
630 Fifth Avenue
New York, New York 10020

To Marshall Sylvester, Berstein & Frankes, Esq
Attorneys for Defendants
505 Fifth Ave
New York NY 10017

Forms C+D + 40 day notice given 4/8/77

Service of three (3) copies of the within
is hereby admitted

this 13th day of July 1977

.....

Attorney(s) for Defendants-Appellees

3 COPY RECEIVED HAND MAIL

WARSHAW, SYLVESTER, BURSTEIN
& FRANKS

ATTORNEYS FOR Defendants

DATE 7/13/77